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**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

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**COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KA-  
TALLA COMPANY, a Corporation,**

**Plaintiffs in Error,**

**vs.**

**JAMES HENEY,**

**Defendant in Error.**

---

**Transcript of Record.**


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**Upon Writ of Error to the United States District Court  
of the Territory of Alaska,  
Third Division.**

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**FILED**

**SEP 6 - 1913**



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Record of U.S. Circuit  
Court of appeals

832



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KA-  
TALLA COMPANY, a Corporation,

Plaintiffs in Error,

vs.

JAMES HENEY,

Defendant in Error.

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Transcript of Record.

---

Upon Writ of Error to the United States District Court  
of the Territory of Alaska,  
Third Division.

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INDEX TO THE PRINTED TRANSCRIPT OF  
RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Acknowledgment of Service of Papers on Writ of Error.....	255
Affidavit of R. J. Boryer in Support of Motion to Quash Summons.....	11
Affidavit of J. V. Lydick in Support of Motion to Quash Summons.....	13
Answer of Copper River & Northwestern Rail- way Company.....	17
Answer of Katalla Company.....	20
Assignment of Errors.....	211
Attorneys of Record, Names and Addresses of..	1
Bond on Writ of Error.....	242
Bond on Writ of Error.....	249
Certificate of Clerk U. S. District Court to Rec- ord.....	262
Certificate of Official Stenographer to Tran- script of Evidence.....	182
Citation on Writ of Error (Copy).....	253
Citation on Writ of Error (Original).....	252
Complaint.....	2
Court's Certificate to Bill of Exceptions.....	183
Court's Certificate to Bill of Exceptions.....	261

Index.	Page
Defendant's Exceptions to the Court's Instructions to Jury.....	199
Defense.....	160
Instructions of the Court.....	174
Instructions Requested by Defendant.....	186
Judgment .....	207
Motion for New Trial.....	195
Motion of Copper River & N. W. Ry. Co. for Directed Verdict .....	171
Motion of Copper River & N. W. Ry. Co. for Nonsuit .....	159
Motion of Katalla Co. for Directed Verdict.....	172
Motion of Katalla Co. for Nonsuit.....	157
Motion for Leave to Amend Complaint by Correction of Name of Defendant, the Katalla Company .....	15
Motion to Quash Summons.....	9
Names and Addresses of Attorneys of Record..	1
Order Allowing Certifying and Settling Bill of Exceptions .....	209
Order Allowing, Certifying and Settling Bill of Exceptions .....	260
Order Allowing Writ of Error.....	240
Order Denying Motion for New Trial, Granting Exception and Fixing Time to File and Present Bill of Exceptions.....	198
Order Denying Motion to Quash Service of Summons and Granting Leave to Amend Complaint by Correction of Name of Defendant "Katalla Company" .....	16



Index.

Page

Order Extending Time for Filing and Docketing	
Transcript on Appeal.....	258
Petition for Writ of Error.....	239
Praecipe for Transcript of Record.....	256
Reply to Answer of Copper River & Northwest- ern Railway Company .....	24
Reply to Answer of Katalla Company.....	22
Stipulation Waiving Service of Papers.....	210
Summons .....	7
TESTIMONY ON BEHALF OF PLAIN- TIF:	
ADLER, HENRY.....	126
Cross-examination.....	129
FORRESTER, J. W.....	144
Cross-examination.....	147
HENEY, JAMES.....	28
Cross-examination .....	54
LATTIN, M. V.....	150
LIKITS, CHRIS. H.....	137
Cross-examination .....	141
SCOTT, THOMAS S.....	152
Cross-examination .....	155
SLIMPET, W. H.....	97
Cross-examination.....	108
Redirect Examination.....	124
TESTIMONY ON BEHALF OF DEFEND- ANT:	
FORRESTER, J. W. (Recalled).....	160
Cross-examination.....	165
Transcript of Evidence.....	27
Trial.....	25

Index.	Page
Trial (Continued).....	169
Trial (Continued).....	184
Verdict.....	185
Writ of Error (Copy).....	247
Writ of Error (Original).....	245

*In the District Court for the Territory of Alaska,  
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff and Appellee,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and THE  
KATALLA COMPANY, a Corporation,  
Defendants and Appellants.

**Names and Addresses of Attorneys of Record.**

E. E. RITCHIE, Valdez, Alaska, Attorney for  
Plaintiff and Appellee.

R. J. BORYER, Cordova, Alaska, Attorney for De-  
fendants and Appellants. [1\*]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

versus

THE COPPER RIVER & NORTHWESTERN  
RAILWAY COMPANY, a Corporation, and  
THE KATALLA COMPANY, a Corpora-  
tion,

Defendants.

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\*Page-number appearing at foot of page of original certified Record.



**Complaint.**

Plaintiff complains of defendants and alleges:

I.

That the defendant, the Copper River & Northwestern Railway Company, is a corporation existing under the laws of the State of Nevada, owning and operating a line of railroad from Cordova, on the Gulf of Alaska, to and beyond the Copper River directly east of the Town of Chitina, all in the Territory of Alaska, and was such corporation at all times hereinafter mentioned. That the defendant, the Katalla Company, is a corporation organized under the laws of the State of New York and doing business in the Territory of Alaska, and was such corporation during all the times hereinafter mentioned. That said Katalla Company is a subsidiary company of the Copper River & Northwestern Railway Company; that in operating said line of railroad the said Copper River & Northwestern Railway Company transacts its business partly through said Katalla Company, which nominally employs and directs many of the men working on said railroad line, but plaintiff is not informed nor is the general public informed, what are the precise functions of said Katalla Company, nor what are its relations to the Copper River & Northwestern Railway Company, but he alleges on information and belief that the said Katalla Company is a mere agency of the [2] said Copper River & Northwestern Railway Company and the operations of said Katalla Company are in reality operations of the Copper River & Northwest-

ern Railway Company, and the Copper River & Northwestern Railway Company is the real employer of men working on its said line in the operation and maintenance of the same.

## II.

That on the 19th day of January, 1912, plaintiff was working in the employ of said Copper River & Northwestern Railway Company, in the nominal employ and under the nominal direction of said Katalla Company, agent of said railway company as aforesaid, in the tunnel on said railway company's line immediately east of the town of Chitina; that plaintiff's work was that of "lagging" the sides of a timber structure over part of said tunnel where a cave-in had occurred, to prevent further caving of the ground overhead; that in doing said work of lagging plaintiff and others worked from a platform at the top of the tunnel proper; that the construction of said platform was incomplete and several gaps had been left in it, one extending across the entire width of the tunnel and about six feet of the linear projection thereof; that this gap or open space in said platform had been negligently left by the defendant corporations without guard-rails; that said tunnel was very dark and the said corporations had negligently failed to place lights adjacent to said gap in said platform to indicate its location, and had failed to furnish lights to the men working in the tunnel to be placed adjacent to said gap in the platform to warn all persons of its location.

## III.

That about 3 o'clock in the afternoon of said 19th

day of January, 1912, when the darkness in said tunnel was intensifying because of the coming of night, the defendant corporations, by their agents and servants, to this plaintiff unknown, wilfully, negligently and wrongfully, ran a locomotive drawing a train of cars through said tunnel, said locomotive leaving a dense volume of coal smoke and a suffocating quantity of coal gas in said tunnel [3] still further intensifying the darkness of the tunnel; that because of said smoke and gas in the tunnel at the place where plaintiff was working, plaintiff was wholly unable to see anything, and was unable to breathe without painful, suffocating and sickening inhalation of coal gas; that for the purpose of escaping from said smoke, gas and intense darkness of the tunnel at the place where he had been working, plaintiff walked slowly and cautiously toward the westerly entrance of said tunnel, to reach which, the same being the only place of exit from said tunnel at that time, it was necessary to pass the said gaps and open space in said platform; that plaintiff proceeded with great care, endeavoring to feel his way, but being confused by the darkness and partially strangled by the inhalation of coal gas as aforesaid, he moved in a state of partial bewilderment, and while groping slowly along said platform he inadvertently stepped into the gap in said platform hereinbefore particularly described and fell to the floor of the tunnel, a distance of about twenty-three feet, upon loose rocks and frozen muck, badly spraining his back and dislocating one or more of the bones of his left hip and rupturing several ligaments of said hip; that in con-

sequence of said injuries plaintiff was confined to his bed for six weeks thereafter continuously, and suffered great physical pain and mental anguish during all of said time, and he has ever since at all times suffered physical pain to a greater or less extent because of said injuries, and ever since leaving his bed has been able to walk only by the aid of crutches, which he is still obliged to use. Plaintiff alleges that said injuries to his hip are permanent, and that because of them he will never again be able to work at his vocation, that of a miner; that he will be able during the remainder of his life to perform only inferior work at inferior pay, whereby his earning capacity and power are permanently impaired to the extent of at least \$2.00 per day; that he is informed by competent medical and surgical authority that he will always suffer pain because of his said injuries, and that repeated surgical [4] operations will be required from time to time to prevent his becoming a helpless invalid. Plaintiff is unable to give a more technical and particular description of his said injuries, but avers that a description of the same is fully within the knowledge of defendant corporations through reports made by Dr. W. W. Council, one of the surgeons employed by said companies, who has made several examinations of said injuries suffered by plaintiff as aforesaid. Plaintiff alleges that at the time of suffering the injuries hereinbefore described he was a strong, able-bodied man in perfect health, capable of earning the highest going wages as a miner, and that at said time he was earning and receiving \$5.00 per day.





**[Summons.]**

*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

THE COPPER RIVER & NORTHWESTERN  
RAILWAY COMPANY, a Corporation, and  
THE KATALLA COMPANY, a Corpora-  
tion,

Defendants.

The President of the United States of America,  
Greeting: To the Above-named Defendants:

YOU ARE HEREBY REQUIRED to appear in  
the District Court for the Territory of Alaska, Third  
Division, within thirty days after the day of service  
of this summons upon you, and answer the complaint  
of the above-named plaintiff, a copy of which com-  
plaint is herewith delivered to you; and unless you  
so appear and answer, the plaintiff will take judg-  
ment against you for the sum of Twenty-five Thou-  
sand Dollars and costs, and apply to the Court for  
the relief demanded in said complaint.

WITNESS, the Hon. THOMAS R. LYONS,  
Judge of said Court, this first day of August, in the  
year of our Lord one thousand nine hundred and

twelve and of our Independence the one hundred and thirty-seventh.

[Seal]

ED. M. LAKIN,  
Clerk.

By V. A. Paine,  
Deputy Clerk.

Marshal's No. 403.    [7]

United States of America,  
Territory of Alaska,  
Third Division,—ss.

I hereby certify that I received the annexed summons on the 8th day of August, 1912, and thereafter on the 15th day of August, 1912, I served the same at Cordova, Alaska, upon the Copper River & Northwestern Railway Company, by delivering to and leaving with George Geiger, service agent of said company, a copy thereof, together with a certified copy of the complaint filed therein. And thereafter on the same date I served the same upon the Katalla Company by delivering to and leaving with George Geiger, service agent of said company, a copy thereof, together with a certified copy of the complaint filed therein.

Returned this 15th day of August, 1912.

H. P. SULLIVAN,  
U. S. Marshal.

By S. T. Brightwell,  
Deputy.

Marshal's Costs:

2 services .....\$12.00

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Aug. 22, 1912. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy. [8]

---

*In the District Court for the Territory of Alaska,  
Third Division.*

#C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corp., and THE KA-  
TALLA COMPANY, a Corp.,

Defendants.

**Motion to Quash Summons.**

Comes now the Katalla Company, a corporation, organized and existing under the laws of the State of New York, appearing specially for this motion and not otherwise, and moves the Court to quash the summons in this action as against the Katalla Company, a corporation, existing under the laws of the State of New York for the reason that the summons and complaint in the above case was served upon George Geiger, who is not now and was not at the time of the service of the summons in this case, an agent or representative of the Katalla Company, a corporation existing under the laws of the State of Nevada, and is not in any way connected with or authorized, nor was at the time of the service of the summons in this case, connected with or authorized to ac-



cept service for the Katalla Company, a corporation, existing under the laws of the State of Nevada. That the said George Gieger upon whom service was made in this case is an agent of the Katalla Company, a corporation, existing under the laws of the State of New York and the representative agent upon whom the service is to be made for said corporation; that the Katalla Company, a corporation, existing under the laws of the State of Nevada, is a separate and distinct person or corporation from the Katalla Company, a corporation, existing under the laws of the State of New York. That this motion is based upon the hereto attached affidavits and the return of the service and the complaint in the case of James Heney, Plaintiff, vs. The Copper [9] River & Northwestern Railway Company, a corporation, and the Katalla Company, a corporation, defendants.

WHEREBY, defendant, the Katalla Company, a corporation, existing under the laws of the State of New York, moves this Honorable Court to quash the service of the summons in this case.

R. J. BORYER,

Attorney for the Katalla Company, a Corporation,  
Organized and Existing Under the Laws of New  
York.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Sep. 16, 1912. Ed M. Lakin, Clerk. By V. A. Paine, Deputy. [10]

*In the District Court of the Territory of Alaska,  
Third Division.*

#C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and the  
KATALLA COMPANY, a Corporation,  
Defendants.

**Affidavit of R. J. Boryer in Support of Motion to  
Quash Summons.**

R. J. Boryer, being first duly sworn, upon his oath deposes and says: That he is Attorney for the Copper River & Northwestern Railway Company, a corporation organized and existing under the laws of the State of Nevada, and is attorney for the Katalla Company, a corporation organized and existing under the laws of the State of New York; that on the 15th day of August A. D. 1912, a copy of summons and the complaint, in which James Heney is named as plaintiff and the Copper River & Northwestern Railway Company, a corporation, and the Katalla Company, a corporation, are named as defendants, said case being #C.—49 of the Third Division of the District of Alaska, was served on George Geiger in Cordova, Alaska; that the complaint in said action designated the defendant, the Katalla Company, as being a corporation organized and existing under the

laws of the State of Nevada; that this affiant personally knows and so states that the said George Geiger, upon whom service was made in this case, is not in any way connected with the defendant, the Katalla Company, named herein; that the said George Geiger is not an agent or representative of any kind of said Defendant Company, and is not in any way connected with and is not the agent of said company for the purpose of service; that the said George Geiger is the regularly appointed agent for the purpose of [11] accepting service for a separate and distinct corporation, known as the Katalla Company, a corporation existing under the laws of the State of New York; that the Katalla Company, a corporation organized under the laws of the State of Nevada, as designated in plaintiff's complaint, is a separate and distinct corporation from the Katalla Company, a corporation organized and existing under the laws of the State of New York; and that the said George Geiger is in no way connected with the Katalla Company, a corporation organized and existing under the laws of the State of Nevada.

R. J. BORYER.

Subscribed and sworn to before me this 13th day of September, A. D. 1912.

[Seal]

CHAS. A. SCOTT,  
Notary Public for Alaska, Residing at Cordova.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Sep. 6, 1912. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy. [12]

*In the District Court of the Territory of Alaska,  
Third Division.*

#C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and the  
KATALLA COMPANY, a Corp.,

Defendants.

**Affidavit of J. V. Lydick in Support of Motion to  
Quash Summons.**

J. V. Lydick, being first duly sworn, upon his oath deposes and says: That he is accountant for the Copper River & Northwestern Railway Company, a corporation organized and existing under the laws of the State of Nevada, and is familiar with and knows of the corporate existence of the Katalla Company, a corporation, organized and existing under the laws of the State of New York; that on the 15th day of August, A. D. 1912, a copy of summons and the complaint, in which James Heney is named as plaintiff and the Copper River & Northwestern Railway Company, a corporation, and the Katalla Company, a corporation, are named as defendants, said case being #C.—49 of the Third Division of the District of Alaska, was served on George Geiger in Cordova, Alaska; that the complaint in said action designated the defendant, the Katalla Company, as being a corporation organized and existing under the

laws of the State of Nevada; that this affiant personally knows and so states that the said George Geiger, upon whom service was made in this case, is not in any way connected with the defendant, the Katalla Company, named herein. That the said George Geiger is not an agent or representative of any kind of said defendant company and is not in any way connected with and is not the agent of said company for the purpose of service; that the said George Geiger is the regularly appointed agent for the purpose of accepting service for [13] a separate and distinct corporation, known as the Katalla Company, a corporation existing under the laws of the State of New York; that the Katalla Company, a corporation organized under the laws of the State of Nevada, as designated in plaintiff's complaint, is a separate and distinct corporation from the Katalla Company, a corporation organized and existing under the laws of the State of New York; and that the said George Geiger is in no way connected with the Katalla Company, a corporation organized and existing under the laws of the State of Nevada.

J. V. LYDICK.

Subscribed and sworn to before me this 13th day of September, A. D. 1912.

[Seal]

R. J. BORYER.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Sep. 16, 1912. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy. [14]



*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

THE COPPER RIVER & NORTHWESTERN  
RAILWAY COMPANY, a Corporation, and  
the KATALLA COMPANY, a Corporation,  
Defendants.

**Motion for Leave to Amend Complaint by Correction  
of Name of Defendant, the Katalla Company.**

Now comes the plaintiff by his attorney, E. E. Ritchie, and moves the Court for leave to amend the complaint by correction of the designation of the defendant, Katalla Company, as follows, to wit: By striking out the word "Nevada" in the eighth line of the first paragraph of said complaint, and inserting in lieu thereof the words "New York." Said amendment to be made by interlineation of the original complaint on file.

Dated April 10, 1913.

E. E. RITCHIE,

Attorney for Plaintiff.

Service of copy acknowledged this 10th day of  
April, 1913.

R. J. BORYER,

Attorney for Katalla Company of New York.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 11, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [15]

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*In the District Court for the Territory of Alaska,  
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RY. CO., a  
Corp., & THE KATALLA CO., a Corp.,  
Defendants.

**Order Denying Motion to Quash Service of Summons  
and Granting Leave to Amend Complaint by  
Correction of Name of Defendant "Katalla  
Company."**

Defendant's motion to quash service of summons having come on to be heard on a prior day of this term, having been argued to the Court by E. E. Ritchie, attorney for plaintiff, and R. J. Boryer, attorney for defendants, and the Court being fully advised and having taken said matter under advisement, now renders his decision on said motion, and

IT IS ORDERED that said motion be and the same is hereby denied, and plaintiff's motion for leave to amend complaint by correction of name of defendant "Katalla Company" having been heard and argued by attorneys, and the Court being fully advised in the premises,

IT IS ORDERED that said motion be and the same is hereby granted, to which order and ruling of the Court defendants except and exception is allowed.

Special April, 1913, Term April 12th—3d Court Day.

Entered Court Journal No. C.—2, page No. 21.  
[16]

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*In the District Court of the Territory of Alaska,  
Third Division.*

C.—No. 49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and  
KATALLA COMPANY, a Corporation,  
Defendants.

**Answer of Copper River & Northwestern Railway  
Company.**

Comes now the COPPER RIVER & NORTH-  
WESTERN RAILWAY COMPANY, answering  
separately says:

I.

Answering paragraph I, admits that it is a corporation existing under the laws of the State of Nevada, but denies each and all of the other allegations contained in paragraph I of the complaint.

II.

Answering paragraph II of Complaint, denies

each and all of the allegations contained in paragraph II of complaint.

III.

Answering paragraph III of Complaint, denies each and all of the allegations contained in paragraph III of the Complaint.

IV.

Answering paragraph IV of the Complaint, denies each and all of the allegations contained in paragraph IV of the Complaint.

AFFIRMATIVE DEFENSE.

Defendant herein, for first separate, affirmative defense, alleges that if plaintiff received an injury at the time and place and manner mentioned in the complaint, said injuries were caused by and arose out of and from risks incident to his employment in which [17] he was engaged and which plaintiff assumed.

Defendant for second separate, affirmative defense, alleges:

That if Plaintiff was injured at the time and place and in the manner mentioned in the complaint, said injuries were caused by the negligence or contributory negligence of plaintiff, and of or by reason of the negligence of a fellow-servant.

Wherefore, defendant prays that this case be dismissed.

R. J. BORYER,

Attorney for Defendant Copper River & Northwestern Railway Co.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 22, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

United States of America,  
District of Alaska,—ss.

I, Caleb Corser, being first duly sworn, deposes and says: That I am the Superintendent of the Copper River & Northwestern Railway Company, one of the defendants named in the above-entitled action, and that the foregoing Answer is true as I verily believe.

Subscribed and sworn to before me this, the 15th day of April, A. D. 1913.

[Notarial Seal]

R. J. BORYER,

Notary Public for the District of Alaska.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 22, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [18]

---

*In the District Court of the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and  
KATALLA COMPANY, a Corporation,  
Defendants.



**Answer of Katalla Company.**

Comes now the defendant, Katalla Company, answering separately, says:

**I.**

Answering paragraph I of Complaint, Katalla Company admits that it is a corporation organized under the laws of New York and doing business in the Territory of Alaska, but denies each and all of the other allegations in paragraph I concerning or alleged regarding the Katalla Company.

**II.**

Answering paragraph II of Complaint, defendant, Katalla Company, denies each and all of the allegations therein contained.

**III.**

Answering paragraph III of Complaint, defendant, Katalla Company, denies each and all of the allegations therein contained.

**IV.**

Answering paragraph IV of Complaint, defendant, Katalla Company, denies each and all of the allegations therein contained.

**AFFIRMATIVE DEFENSE.**

Defendant, Katalla Company, for the first separate affirmative defense, alleges that if plaintiff received any injury at the time and place and manner mentioned in the complaint, said injuries were caused by and arose out of and from risks incident to his employment in which [19] he was engaged and which risks the plaintiff assumed.

Defendant, Katalla Company, for second affirmative defense, says:

That if plaintiff was injured at the time and place and manner mentioned in the complaint, said injuries were caused by the negligence of the plaintiff and of or by reason of the negligence of a fellow-servant.

Wherefore defendant prays that this case be dismissed.

R. J. BORYER,  
Attorney.

United States of America,  
District of Alaska,—ss.

I, Caleb Corser, being first duly sworn, deposes and says: That I am the Resident Manager and attorney in fact of the Katalla Company, one of the defendants named in the above-entitled action, and that the foregoing Answer is true as I verily believe.

CALEB CORSER.

Subscribed and sworn to before me this the 15 day of April, A. D. 1913.

[Seal]

R. J. PORYER,  
Notary Public for the District of Alaska.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 22, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [20]

*In the District Court for the Territory of Alaska,  
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY, a Corporation, and KATALLA COM-  
PANY, a Corporation,

Defendants.

**Reply to Answer of Katalla Company.**

Now comes the plaintiff and replying to the allegations of the affirmative defense set up in the answer of the defendant, the Katalla Company, alleges:

I.

He denies that the injuries he received as described in his complaint were caused by and arose out of risks incident to the employment in which he was engaged and which he assumed, and he denies that in the course of his said employment he assumed any risk which was an efficient cause of his said injuries.

II.

He denies that his said injuries, described in his complaint, were caused by his own negligence or contributory negligence, or by reason of the negligence of a fellow-servant, or in any degree caused by his own negligence or contributory negligence, or the negligence of a fellow-servant.

Wherefore plaintiff asks judgment as prayed for in his complaint.

E. E. RITCHIE,  
Attorney for Plaintiff. [21]

United States of America,  
Territory of Alaska,—ss.

James Heney, being duly sworn, says he is the plaintiff herein; that he has read the foregoing reply and he believes the same to be true.

JAMES HENEY.

Sworn to and subscribed before me this 3d day of May, 1913.

[Seal]

GEORGE DOOLEY,  
Notary Public.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 5, 1913. Angus McBride, Clerk. By Thos. E. Scott, Deputy. [22]

---

*In the District Court for the Territory of Alaska,  
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY, a Corporation, and KATALLA COM-  
PANY, a Corporation,

Defendants.

**Reply to Answer of Copper River & Northwestern  
Railway Company.**

Now comes the plaintiff, and replying to the allegations of the affirmative defense set up in the answer of the defendant, Copper River & Northwestern Railway Company, alleges:

**I.**

He denies that the injuries he received as described in his complaint were caused by and arose out of risks incident to the employment in which he was engaged and which he assumed, and he denies that in the course of his said employment he assumed any risk which was an efficient cause of his said injuries.

**II.**

He denies that his said injuries, described in his complaint, were caused by his own negligence or contributory negligence or by reason of the negligence of a fellow-servant, or in any degree caused by his own negligence or contributory negligence, or the negligence of a fellow-servant.

Wherefore plaintiff asks judgment as prayed for in his complaint.

**E. E. RITCHIE.**

Attorney for Plaintiff. [23]

United States of America,  
Territory of Alaska,—ss.

James Heney, being duly sworn, says he is the plaintiff herein; that he has read the foregoing reply and he believes the same to be true.

**JAMES HENEY.**



Sworn to and subscribed before me this 3d day of May, 1913.

[Seal]

GEORGE DOOLEY,  
Notary Public.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 5, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [24]

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*In the District Court for the Territory of Alaska,  
Third Division.*

SPECIAL APRIL, 1913, TERM—MAY 6th—23d  
Court Day—Tuesday.

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corp., KATALLA  
COMPANY, a Corp.,

Defendants.

**Trial.**

Now, on this day, the trial of the above-entitled cause came on regularly for trial—E. E. Ritchie appearing as attorney for the plaintiff, R. J. Boryer, attorney for defendants, and both sides announcing their readiness for trial, the following were selected

and sworn as trial jurors to try the issues in this cause:

- |                          |                    |
|--------------------------|--------------------|
| 1. A. S. Jensen,         | 6. C. H. Golden,   |
| 2. J. L. King,           | 7. L. C. Townsend, |
| 3. J. E. Currier,        | 8. Geo. Brown,     |
| 4. Joseph Lee,           | 9. L. H. Pederson, |
| 5. E. F. Bell,           | 10. Smith Higgins, |
| 12. J. M. Daugherty. and | 11. Karl Long.     |

WHEREUPON opening statements were made by both attorney for plaintiff and attorney for defendants.

WHEREUPON James Heney was sworn and testified in his own behalf.

WHEREUPON Plaintiff's Exhibit "A" was offered and admitted in evidence.

WHEREUPON W. H. Slimpert, Henry Edler, C. H. Leikets, J. W. Forrester, M. V. Lattin and Tom Scott were [25] sworn and testified as witnesses on behalf of the plaintiff.

THEREUPON plaintiff rests.

THEREUPON, the defendant Copper River and Northwestern Ry. Co. and the Katalla Company, by and through its attorney, R. J. Boryer, filed their written motion for a judgment of nonsuit, which said motion was by the Court denied, to which order and ruling of the Court defendant excepts and exception is allowed.

WHEREUPON J. W. Forrester was recalled and testified as a witness on behalf of the defendants.

THEREUPON defendant rests.

WHEREUPON, it being the hour of adjournment, the further trial of the above-entitled cause is continued until to-morrow at the hour of ten o'clock A. M.

Entered Court Journal No. 2, page No. 87. [26]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

THE COPPER RIVER & NORTHWESTERN  
RAILWAY COMPANY, a Corporation, and  
THE KATALLA COMPANY, a Corpora-  
tion,

Defendants.

**Transcript of Evidence.**

BE IT REMEMBERED, that the above-entitled cause came on duly and regularly to be heard at Cordova, Alaska, on the 6th day of May, 1913, at 10 o'clock A. M., before the Honorable PETER D. OVERFIELD, Judge of said court and a jury:

The plaintiff herein being represented by his attorney and counsel, E. E. Ritchie, Esq.

The defendants herein being represented by their attorney and counsel, R. J. Boryer, Esq.

Opening statements were made to the Court and Jury by Mr. Ritchie in behalf of the plaintiff and by

Mr. Boryer in behalf of the defendants.

Whereupon the following additional proceedings were had and done: [27]

**[Testimony of James Heney, in His Own Behalf.]**

JAMES HENEY, the plaintiff, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name?      A. James Heney.

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. Where do you live?      A. At McCarthy.

Q. Where were you living and working on January 19, 1912?

A. I was living in Chitina and working in the Chitina tunnel.

Q. How long had you been working there?

A. Pretty close to three months—two months and a half.

Q. What had you been doing in the tunnel during that time—what did you first do?

A. I was foreman there, getting the dirt out of the tunnel—that was the first job I got.

Q. What has been your business a good part of your adult life?      A. I follow up mining.

Q. Hard rock mining?      A. Yes, sir.

Q. Now, after you finished this job getting the dirt out of the tunnel, what did you do next?

A. Then we went out to the woods cutting logging.

Q. Getting the dirt out of the tunnel—you mean

(Testimony of James Heney.)

you were cleaning out the dirt and rock from the cave-in that occurred the summer before?

A. Yes, sir.

Q. After you finished the timber, when did you work in the tunnel again? [28\*—2†]

A. We were out in the woods seven or eight days, I should judge, and came back again and started lagging up the tunnel.

Q. That was lagging up between the tunnel proper and the dirt sides?

A. Yes, sir, the sides of the tunnel.

Q. How long did you work at that?

A. I was working at that until I got hurt.

Q. How long before you were hurt had you been working there?

A. I guess about three weeks or a month, as far as I can judge.

Q. How long had you been working on top of this platform?

A. I couldn't exactly say. It must be two or three weeks working on top of the platform.

Q. Can you describe the interior of the tunnel in your own language so the jury can understand it?

A. I think I can.

Q. So as to explain the lagging work and the other work you did on top of the platform?

A. The tunnel sets, we put in new timber there and they were put some places three inches, down near

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\*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Testimony as same appears in Certified Transcript of Record.



(Testimony of James Heney.)

the bottom, where we put in three-inch lagging and then it varied—as it went up it got wider and at the top of the tunnel it might be three feet or four feet in places, some places less, and we were lagging that and then at the top of this tunnel they raised another set, on top of that to catch the cave-in along at the back of the tunnel, and we had to lag that the same down along the side and along the top to catch up with that.

Q. Who were you working for there?

A. Mr. Forrester was engineer, I think, up there.

Q. From whom did you get your pay?

A. I think the Katalla Company. [29—3]

Q. On what road were you working?

A. The Copper River & Northwestern.

Q. That is the line of railroad that runs from Cordova to Chitina and beyond and through the Chitina tunnel? A. Yes, sir.

Q. You had been working inside the tunnel about how long would you say on that platform or around it?

A. On the top timbers I was working there about three weeks, I think, as near as I can guess.

Q. Describe this inner tunnel, the timber part of the tunnel, how high was it and what timbers was it constructed of and how wide was it?

A. The timbers were about—I guess a regular set of timbers must be 21 feet from the track up to the top and then up above there was—well, at the cave-in they varied from 12 ft. timbers to about 18, I should judge, in places, to catch up the back.

(Testimony of James Heney.)

Q. How wide was this platform you were working on?

A. It went right across the tunnel; about 18 or 20 ft., I think.

Q. During that time when you were working in the tunnel, how was the place lighted?

A. Sometimes it was lighted up pretty good.

Q. How was it lighted in the first place, describe the light.

Mr. BORYER.—We object to the introduction of any testimony except as to the light at the time of the injury.

Mr. RITCHIE.—It goes to the company's negligence.

Objection overruled. Defendant allowed an exception.

Q. Describe the way it was lighted.

A. We had carbide lights there—it threw very good lights; we could see all around the tunnel; in fact, we had two of [30—4] them part of the time and we had a couple of gasoline torches.

Q. Those carbide lights, what power were they, if you know?

A. I couldn't tell the power of them, but they threw a good light.

Q. How far would they throw light?

A. Two or three hundred feet.

Q. Would they light the tunnel?

A. Yes, they would light the tunnel.

Q. Describe them and how they were placed.

A. These carbide lights, they stood in a tank about

(Testimony of James Heney.)

that high (indicating). You put the carbide into a little tank and this tank is full of water, and there is a box in it and you put a light over it and put a match to it and it forms gas and lets the light through.

Q. That threw a very clear light?

A. That threw a very clear light.

Q. When these were in use in the tunnel how would the light in the tunnel compare with the ordinary well-lighted city street?

A. Yes, it was as good a light as you see in a city street.

Q. Did they take those lights away?

A. Yes, they took one of them away and they took the carbide they had for the other one down to the wreck with them.

Q. That was in what month?

A. In the month of January, 1912.

Q. They took them down to bridge 75A?

A. Where that rotary was hurt, yes.

Q. After they ceased to have the carbide lights, how did they light the tunnel?

A. We had some gasoline torches there. [31—5]

Q. Describe them.

A. It was a lamp you hang up on a post and there was a lot of holes in it. When you put a match to it it threw the light out, maybe five or six lights would spread out through the torch.

Q. How much light did they throw?

A. Quite a bit but not as much as the other.

Q. Did they make the tunnel comparatively light?

A. Not all over the tunnel; no.

(Testimony of James Heney.)

Q. How far could you see from those lights and see quite distinctly?

A. Twenty or twenty-five feet, probably.

Q. How long before you had this accident was it that they took those lights away?

A. I couldn't say exactly. I think they were gone four or five days.

Q. After that what lights did you have?

A. We used the gasoline torches and we ran out of gasoline and then we had only lanterns then, three lanterns.

Q. What kind of lanterns were those?

A. Small, little ordinary lanterns that you pack around when you are going out at night.

Q. Such as an individual carries with him to go home by? A. Yes, sir.

Q. You had been working solely by those lights for several days? A. By lanterns?

Q. Yes.

A. Yes; we had been working two or three days, that I know of.

Q. On this particular day when the accident happened how many [32—6] men were working on top of the platform?

A. Up where I was working?

Q. Yes.

A. There were four of us working there.

Q. Who were those men?

A. I don't know their names—Barry Slimpet was one and a fellow named Henry—I forget his other

(Testimony of James Heney.)

name—and a little fellow named Shorty, called Shorty.

Q. What was each of the men doing?

A. Shorty was taking the measurement of these post timbers or lagging we were putting in.

Q. Explain the work you were doing there that day.

A. These are the posts—there are four posts going along the top across the tunnel, the same as this one—they were four feet apart.

Q. Above the platform there is an upper structure to the tunnel?     A. Yes, sir.

Q. And these posts you are speaking of are the upper structure?     A. Yes, sir.

Q. Here is your platform and above that is another—

A. Yes, another set of timbers on top of the platform.

Q. And those timbers you were lagging between were the upper timbers on the platform?

A. Yes, sir.

Q. You may proceed.

A. I was putting in those pieces of 2 by 12 right in between the posts and the top of the tunnel.

Mr. RITCHIE.—With the consent of Mr. Boryer we will use these photographs (handing to witness).

The WITNESS.—Here is the tunnel here; here is the first set of [33—7] timbers in the tunnel and this is the caved-in part of it here; there is a platform up here, a platform up here on top of this tunnel. This is the first set of timbers; then this is the



(Testimony of James Heney.)

next set here, right here. This man was taking the measurements between these posts here. He measures them and the other two men cut them and I was putting them in their place.

Juror PEDERSEN.—What is the lagging you speak of?

A. We had to lag up here—here is the side; we had lagging—and there might be a space in between here and here 3 ft—it varied from two or three inches to three feet.

Q. Of what kind of timber were those lagging made?

A. Some 2 by 6 and 2 by 12 and all kinds of old junk picked up around the camps, and when we ran out of that we put in split lagging and round lagging that we cut in the woods.

Q. How long had you been working on that lagging between the posts?

A. I think it must be about a month, all told, since we started.

Q. This particular work you were doing that day?

A. We started there that morning on this particular work.

Q. During your previous work in the tunnel had they ever run trains through the tunnel?

A. Yes, sir.

Q. How often?

A. I think they ran a train nearly every day there back and forth.

Q. When those trains would come through the tunnel just state what effect it had and if it was dif-

(Testimony of James Heney.)

ferent at different times, state that.

A. Sometimes when a train would be coming through the tunnel [34—8] we would get orders from Mr. Forrester if he had any timbers to take in and we knew it was coming in, he would tell us to go out and take the timbers in and let the smoke go out. Sometimes we wouldn't have the timbers and it was awfully cold and it is warm up there, and we would be all wet from handling the lagging and timbers and our clothes would be all wet, and we would get stiffened up with the cold, get all froze up, and sometimes we would sooner stay up there than go down and get cold.

Q. I asked you what was the effect where a train would come through the tunnel, that is, as to smoke and gas, and was it always the same.

A. Some days a train would come through and there wouldn't be so much smoke and other times when they coaled up coming into the tunnel there would be an awful lot of smoke come up there and it was suffocating.

Q. You were working for Mr. Forrester—he was the engineer in charge? A. Yes, sir.

Q. Had you a foreman?

A. Yes, part of the time.

Q. Who was that?

A. Dan Lee was on there and Mr. Boyle was on.

Q. Had you any particular orders from Mr. Forrester or from your foreman as to what you were to do when a train or engine went through there and left smoke or gas in the tunnel? A. No, sir.

(Testimony of James Heney.)

Q. Was Mr. Forrester ever present when they did go through and tell you at those times what to do?

A. I couldn't say whether he was there or not.  
[35—9]

Q. Did he ever give any orders to you direct or to any of the men which you ever heard?

A. No, not that I heard—he never gave any orders to me or any of the men that I heard.

Q. You stated that the smoke and gas were worse at times than others?     A. Yes.

Q. Now, did it ever get so bad that it interfered with your work?     A. Yes, sir.

Q. And at such times was the volume of smoke and gas more noticeable and more oppressive in some places than others, or was it uniform?

Mr. BORYER.—We object to that as leading.

Objection overruled. Defendant allowed an exception.

A. Yes; it was more at some places—where the floor would be tight the smoke wouldn't come up so quick or so fast through that, and other places maybe nine or ten feet away the smoke would come up there pretty bad.

Q. When the trains did go through leaving smoke, what did you do and if you did different things at different times, tell the jury what you did the different times.

A. When the train would go through, sometimes we would go down—if we had anything to do we would go down below and let the smoke go out, and if we didn't have nothing to do, we wouldn't go down

(Testimony of James Heney.)

but we would stay up there where it was warm.

Q. Now, on the particular day that you were there that this accident happened, you state there were four men working on the platform.

A. Yes, sir. [36—10]

Q. Was anybody working down below in the tunnel, on the ground floor?

A. I am not sure. There was one or two men down below; they were sending up the lagging to us.

Q. Was there any foreman?

A. No, not that day—Mr. Forrester came around in the morning and gave us our orders.

Q. Mr. Forrester was in town that day?

A. Yes, sir.

Q. And gave you orders that day, that morning?

A. Yes, sir.

Q. You had no foreman with you that day?

A. No, sir.

Q. Had you a foreman the previous day?

A. Yes, sir.

Q. Who was the foreman?

A. I think George Hayes was giving us orders the previous day.

Q. Describe this hole to the jury.

A. There was a gap left right across the tunnel, between the new tunnel that we were putting up and the old tunnel that had fallen down—there was a gap of 6 feet wide left in the tunnel.

Q. Six feet of the linear projection of the tunnel?

A. Yes, sir.

Q. And how long was it across the tunnel?

(Testimony of James Heney.)

A. It went right across the tunnel—it must be 20 feet wide, I guess.

Q. Was that hole visible or otherwise when they had the bright lights?

A. Yes, it was visible when we had those lights.  
[37—11]

Q. Could easily be seen?

A. Could easily be seen.

Q. And after you got down to small hand lanterns, how was it?

A. You couldn't see it unless you walked along with a lantern in your hand.

Q. When the tunnel would get full of smoke after you had gotten down to hand lanterns how well could you see?

A. You couldn't see hardly anything only in places—you might see a place where the floor would be lagged tight and the smoke couldn't come up so bad through there.

Q. If you held your lantern out extended in your hand before you, how far could you see?

A. You couldn't see any distance at all ahead of you with the lantern when the smoke was thick.

Q. Where the smoke was coming up could you see the floor with your lantern, when you held it up?

A. No, sir.

Q. After they took away the large lights and you had only lanterns, was there any light to indicate the location of this hole?     A. No, sir.

Q. Did they put any guard rail around it?

A. No, sir.



(Testimony of James Heney.)

Q. Anything to indicate it at all?

A. Not a thing.

Q. Then coming to the hole, unless a man had a light before him, would there be anything to indicate to him that he had come to the hole?

Mr. BORYER.—We object to that.

Objection overruled and defendant allowed an exception.

A. Nothing at all. [38—12]

Q. Tell what happened on this afternoon—the last few minutes before this train came through, what were you doing and what happened after the train came through. Did any train come through that afternoon, the 19th of January, 1912?

A. Yes, sir.

Q. Tell what you were doing when the train came in.

A. We were putting in this filling between the timbers and the train came into the tunnel and blew before it came into the tunnel; we were quite a distance away from where the ladder was.

Q. To go back. How did you get up to the platform when you went up to work?

A. We got up by a ladder on the side of the tunnel.

Q. Where was the ladder located?

A. On the east end of the tunnel.

Q. Describe that tunnel, the length of it, that is, the timbered part of it and the approaches to it.

A. The cave-in?

Q. I want you to describe the whole tunnel, in-

(Testimony of James Heney.)

cluding the open approaches to it—where does it start from with relation to the town of Chitina?

A. It starts from Chitina going east—an open cut going in for a distance of about, I guess, 300 ft., as near as I can judge before they start this tunnel. Then they start in timbering and about five or six hundred feet of the tunnel there is timbered.

Q. The town of Chitina is at the west end of the tunnel?

A. The town of Chitina is at the west end of the tunnel.

Q. And the tunnel runs nearly east?

A. Yes, east and west.

Q. After you get through the tunnel proper what is on the east end of it toward the Copper River?  
[39—13]

A. There is another cut on the east end of the tunnel.

Q. Just describe the track for half a mile or so from the east end of the tunnel, that is, running towards the river.

A. Well, as you come out from the mouth of the tunnel, the track is on a curve—

Q. Which way?

A. As you go east towards the Copper River.

Q. Which way does it curve, right or left?

A. It curves to the left.

Q. Coming this way, coming along the bank of the Copper River?

A. Yes, sir. And there is an awful grade until

(Testimony of James Heney.)

you get down to pretty near the bridge, the Copper River.

Q. How far is the bridge from the easterly end of the tunnel?

A. I should judge about a quarter of a mile, a little better maybe.

Q. Do you know the grade coming up that hill from the Copper River bridge?

A. I couldn't say exactly the grade—it is a very heavy grade coming up there.

Q. Whereabouts was the ladder located upon which you climbed to the top of the platform to go to work?

A. The cave-in was in the center of the tunnel, pretty near the center, and the ladder was about middle ways or a little more or better going to the east than middle ways, in the side of the tunnel.

Q. And how far was that ladder from where you were working at the time the train came through?

A. I should judge 50 or 75 ft.

Q. Towards the Copper River end?

A. Yes, sir.

Q. That was an ordinary ladder against the side of the tunnel? [40—14]      A. Yes, sir.

Q. And you climbed that ladder—now, what sort of a hole was there in the platform for you to go through?

A. There was a hole left there between the flooring and the side of the timbers, this lagging we put in.

Q. How far was that hole from the one you fell through later?

(Testimony of James Heney.)

A. It must be 100 ft., I guess, as near as I can judge.

Q. The hole you fell through was toward the Chitina end?     A. Yes, sir.

Q. And you were working between those two places?

A. We were working between those two places.

Q. How far away from the hole you fell through?

A. I forget now about how many sets of timbers we had put in—I think seven or eight sets we had put in.

Q. That would be how many feet?

A. About 25 or 30 feet, I would say.

Q. What were you doing when the train came in—working at this job you have described?

A. Yes, I was working at that job.

Q. Go ahead and tell the jury in your own language what happened.

A. Well, right where we started to put in this lagging, this fellow was taking the measurements and he didn't take the exact measurements right; some were a little long and more of them were too short, and three pieces there we didn't get the right length of, and there was one piece, the piece alongside the hole, he left out, and we got a ways ahead and then he went back and took the measurement of this piece, just before the train came through, and right as the train was passing by, he came to me and said, "Jimmy, I have been [41—15] back there now and took the measurements and you had better go back there and put them in," and I said, "All right," and the smoke

(Testimony of James Heney.)

was coming up pretty thick where we were working—

Q. This was about the time the train came in?

A. Yes, sir.

Q. Describe the approach of the train, its passage through the tunnel, and tell when you first noticed it and tell about the train going through the tunnel.

A. When we first noticed the train we were working about 20 ft. away from this place where I fell off—at the time the train first came through the tunnel; and the train blew the whistle at the mouth of the tunnel and came rushing in and the smoke came up through the floor and smothered that place up so it was something fierce up there.

Q. Had you any notice of the train before it whistled at the mouth of the tunnel?

A. No, sir. And then I went over and was going over to this place where I was working and put in this piece and the smoke was so densely thick and suffocating that I walked into the hole.

Q. When you walked away from where you were working, what were you doing, what was your intention? A. To go back and put in this lagging.

Q. Could you see?

A. Well, I could see places in the floor where the smoke wasn't coming up quite as thick as where we were standing.

Q. When you were walking along there, were you carrying anything?

A. A lantern and hammer—I wouldn't say exactly whether I had the hammer with me or not, but I must have had because I [42—16] couldn't put the



(Testimony of James Heney.)

lagging in without a hammer and I was working at the other place.

Q. What had been the effect of the smoke and gas upon you—what was your condition as to being able to notice any one around you?

A. I was in pretty bad condition with the smoke—could hardly breathe, it was coming up so thick—it was suffocating.

Q. How much could you see as you walked along with the lantern in your hand?

A. You couldn't see anything at all, hardly.

Q. What happened to you then?

A. I was groping along, going back looking for the place where I was going to work, and I walked into this hole. The smoke was coming up so thick and I had the lantern in my hand but I couldn't see the hole.

Q. What happened after that?

A. I don't know—I got knocked out. I fell into the hole.

Q. When were you next conscious?

A. I don't know how long I was down there. The next I knew I was outside of the tunnel and they were sending for a stretcher for me.

Q. When you were outside of the tunnel what were you doing and what position were you in and who was there? A. There was Chris Likits there.

Q. Do you know how you got outside of the tunnel?

A. No, sir. I was lying on the middle of the track in the snow when they came with a bunk; they were going to use it for a stretcher, and they put me in the bunk and when they went to lift me up, I couldn't

(Testimony of James Heney.)

stand the pain in my leg and I said, "I will try to put my arms around your neck and let you pack me,"—I couldn't stand the bunk when I was put in [43—17] there, and they got under me and packed me home.

Q. Who carried you home?

A. Chris Likits and the blacksmith—I don't know the blacksmith's name—and Mr. Slimpet helped pack me.

Q. After they took you home, they put you in bed there? A. Yes, sir.

Q. And who came to see you?

A. Mr. Forrester came and they sent for a doctor.

Q. Who was the doctor? A. Dr. Thom.

Q. He was a physician there at Chitina?

A. Yes, sir.

Q. Did he make an examination of you?

A. Yes, sir.

Q. Now, describe your injuries, from your own knowledge of them, and from what the doctor told you.

A. From what they told me my leg was twisted right around—my left leg was twisted right around.

Q. What part of it was twisted and where if at all was there any injury?

A. This part here, this hip here, was thrown out of its socket and was twisted right around.

Q. Was it dislocated?

A. Dislocated—and I was suffering some awful pain, and they gave me some chloroform and got some more men around there to help them hold me down until he set the leg.

(Testimony of James Heney.)

Q. Was there any other injuries besides this to your hip?

A. My back bothered me for a long time but does not bother me so much now.

Q. In what way did it bother you? [44—18]

A. When I walked it would snap and hurt me.

Q. Was there any bones broken? A. No.

Q. Just the dislocation and the pain in your back?

A. Yes, sir.

Q. How long did you lay in the house in bed?

A. About six weeks I laid in bed.

Q. Did any other physician attend you during that time?

A. Yes, Doctor Council came up on the next train.

Q. The next train after you were hurt?

A. Yes, sir.

Q. What did Doctor Council do and what did he say?

A. He looked at me,—he examined me and said I was all right.

Q. What did he mean by that?

A. He said that the leg was set all right.

Q. How long did Doctor Council attend you?

A. Well, he came up on that train and went down on the next one.

Q. Did he attend you any during the time that you were confined to your bed after that?

A. He came up off and on and gave my wife orders—told her what to do.

Q. You remained in bed about six weeks?

A. Yes, sir, I remained in bed about six weeks.

(Testimony of James Heney.)

Q. And after that, what pain, if any, did you suffer and what effect did your injury have upon you?

A. For three weeks my bowels never moved unless my wife would give me an injection—my bowels were swelled up and wouldn't move, and I had to have an injection, with about a gallon of water, until my bowels would move.

Q. That was while you were in bed? [45—19]

A. That was while I was in bed.

Q. Did you suffer any pain during that time?

A. Yes, sir—I would have a little cough in the morning. I would sleep a couple of hours in the night and the most pain I would suffer would be trying to get that little cough up in the morning.

Q. After you got out of bed, after the six weeks, did you go at once out of the house? A. No.

Q. How long before you were able to go out of the house?

A. There was snow and ice and I couldn't go out very well—I would go out as far as the door.

Q. How did you walk? A. With crutches.

Q. How long did you use crutches?

A. I used them until some time in July—I used them quite a long time; then the last month or six weeks—then I used only one.

Q. During this time that you were going about on crutches, what was your condition as to suffering any pain?

A. I had to walk very slowly with my hip or it would hurt me all the time—in fact it hurts me to-day. From the day my hip got hurt it aches me,

(Testimony of James Heney.)

right until to-day—now it is aching me.

Q. When you were on crutches, could you raise your weight on that hip?     A. No, sir.

Q. And during those months did you suffer any pain in your hip and back?

A. Yes, sir. [46—20]

Q. Much or little?

A. I was suffering right along with it.

Q. How long was it before you ceased to suffer much pain?

A. About in the middle of July or middle of June I could go along very well with one crutch and lean upon my leg quite a lot.

Q. After you threw away your crutches did you go to work?     A. No, sir.

Q. When did you go to work or attempt to go to work?

A. The latter part or the end of June, Mr. Curry sent for me, that he had a contract.

Q. Who is Mr. Curry?

A. Mr. Gray's assayer, I think, out at the Copper Mountain. He had a contract and I worked up there for him before and he send for me, *though* I might be able to do this contract.

Q. What was the work?     A. It is a tunnel.

Q. A tunnel in a mine?     A. Yes, sir.

Q. Did you go up there?

A. Yes, I went up there.

Q. What did you do?

A. When I got up there, I got up to the tunnel. It took me a long time to climb up the hill. I could



(Testimony of James Heney.)

climb up better than I could come down—coming down it was steep and I couldn't put the heft of my body on my leg.

Q. After you got up there, did you do anything about the contract?      A. No, sir.

Q. Did you start?

A. I didn't start; no.      [47—21]

Q. Why not?

A. Well, I wouldn't be able to walk up, from the camp up to the tunnel and down again,—it would take me nearly all day to walk up and down,—I wouldn't be able to do any work when I got up there.

Q. You saw you couldn't do it?      A. Yes, sir.

Q. Was it a good contract or otherwise?

A. The man who took it after me made \$12.50 a day.

Q. For how many days?

A. I think it was a \$1,200 contract.

Q. Then you went back to Chitina?

A. No, I went back to 158.

Q. What did you do there?

A. I stayed there with my wife and she was doing the cooking for the railroad.

Q. Your wife was cooking there for the railroad?

A. Yes, sir.

Q. Did you assist her?

A. Yes, I helped wash dishes around there.

Q. When did you first go to work after that? After the work you did at 158—have you had any regular employment since?

A. No, never had any regular employment since.

(Testimony of James Heney.)

Q. What did you do after that—after you left 158?

A. Came back to Chitina and then I stayed there in Chitina until last December and we made up our mind then to go to McCarthy and start a restaurant; we were not doing anything at Chitina and I wasn't able to work.

Q. McCarthy—that is near the end of the railroad line?

A. Yes, sir; and we started a little restaurant up at McCarthy.

Q. And you have been running that since?  
[48—22]

A. Yes, sir.

Q. And what have you done about it?

A. I hauled water all winter with the dogs and chopped wood and sawed it.

Q. Have you done any other work than that?

A. I put up a building there—had men hired to do the heavy work for me.

Q. Have you done any heavy work since you were hurt?     A. No, sir.

Q. Are you able to do any heavy work?

A. No, sir.

Q. Why not?

A. My hip is not strong enough yet.

Q. How about your back?

A. My back is not bothering me as much as my hip is.

Q. Can you lift heavy weights?     A. No, sir.

Q. Can you lift ordinary weights?

A. Yes, I can lift a pretty good weight.

(Testimony of James Heney.)

Q. But not heavy weights that will cause a strain?

A. No, sir.

Q. You testified in the beginning that your occupation has been that of a hardrock miner a good part of your life?     A. Yes, sir.

Q. How old are you?     A. 38.

Q. You were 37 when hurt?     A. Yes, sir.

Q. How long were you a miner?

A. Off and on for the last sixteen or seventeen years.

Q. Whereabouts? [49—22½]

A. I mined in Butte quite a long time and worked up in British Columbia a while.

Q. How long have you been in Alaska?

A. Came up to Alaska in 1910.

Q. And what were you doing after 1910, until you got this job?

A. I started at Teikell.

Q. Who were you working for?

A. I was working on the railroad.

Q. You were working mostly on the railroad up to the time that this accident happened?

A. No, I worked a month there in 1910 and then went to Chitina, took my wife and family to Chitina, went up there on a boat and I located there and I cleared off some of the townsite, and then I went up to Kuskolina to do some assessment work up there for Mr. McConnell.

Q. What wages were you drawing from the Katalla Company at the time you were hurt?

A. Fifty cents an hour.

(Testimony of James Heney.)

Q. How many hours were you working a day?

A. Ten hours.

Q. You drew \$5.00 a day?      A. Yes, sir.

Q. What wages have you generally been getting, when you worked for the railroad or the Townsite Company during the three years you have been in Alaska?

A. With the Townsite Co. I cleaned up \$10.50 a day.

Q. What wages did you usually draw when you were working for wages?

A. \$125, I got when I worked for Jim McConnell—from \$100 to 125, a month and board. [50—23]

Q. Are you able to do the work of a miner?

A. No, sir.

Q. Or carpenter work generally?      A. No, sir.

Q. On account of these injuries?

A. Yes, sir, on account of these injuries.

Q. From what the doctors have told you and from what you know of your own injuries, do you believe you will ever be able to work as a hard rock miner again?      A. I don't believe I will.

Q. Describe your physical condition now to the jury.

A. For the reason that I know I can't work in the mine. It is very rough and I would have to walk over rough places. I am all right in a place that is level but when I get into a rough place, the least little twist I give I fall over on that side.

Q. When you walk, can you walk perfectly as you did before?      A. No, I am lame.

(Testimony of James Heney.)

Q. On what account?     A. On account of my hip.

Q. Left hip?     A. Yes, sir.

Q. You walk with a limp in your left leg?

A. Yes, sir.

Q. Do you suffer any pain from your hip?

A. Yes, sir.

Q. Is it constant or otherwise?

A. There is a constant pain in here, in my hip—a kind of drawn pain all the time in here.

Q. Do you suffer any pain in your back now?

A. Not much, no. Once in a while my back may snap a little. [51—24]

Q. You are pretty well over it?     A. Yes, sir.

Mr. RITCHIE.—That is all.

(At 11:15 court took a recess for ten minutes.)

Court reconvened at 11:25.

Cross-examination.

(By Mr. BORYER.)

Q. You say you came to Alaska in 1910. For whom were you working in 1910?

A. I worked at Teikell.

Q. What were you doing at Teikell?

A. I was foreman there on a job.

Q. Did you work on the Copper River & Northwestern?     A. Yes, sir.

Q. For whom?     A. For Mr. Heney.

Q. Mr. Heney paid you, did he?     A. Yes.

Q. And you were working for him?

A. Yes, sir.

Q. When you say you were working on the Copper River & Northwestern you mean that you were work-



(Testimony of James Heney.)

ing on the line of railroad that begins at Cordova and extends to the Kennecott mines? A. Yes, sir.

Mr. RITCHIE.—You are referring to the last employment?

Mr. BORYER.—I am referring to this particular time.

Q. You stated in your direct examination that you were working on the Copper River & Northwestern railroad. You mean that you were working on the line of railroad that extends from Cordova to the Kennecott mines, 196 miles?

A. Yes, sir. [52—25]

Q. At the time you were injured you were working on this same railroad? A. Yes, sir.

Q. And that is what you mean by saying that you were working for the Copper River & Northwestern Railroad? A. Yes, sir.

Q. You were drawing your salary from the Katalla Company, were you not?

A. I had the Katalla Company's check.

Q. Mr. Lee, your foreman, was working for the Katalla Company at that time?

A. I should think he was.

Q. Mr. Forrester was working for the Katalla Company at that time, was he not? A. Yes, sir.

Mr. RITCHIE.—If you know, of your own knowledge.

A. Well, I couldn't say whether the Copper River & Northwestern Railway Company or the Katalla Company—I couldn't tell at that time.

Q. In regard to Mr. Forrester or Mr. Lee?

(Testimony of James Heney.)

A. No. They were working there the same place I was working.

Q. You were doing construction work, were you?

A. Yes, sir.

Q. You worked for Mr. Heney how long?

A. A month.

Q. Did you begin working for him as soon as you came up here?

A. No, sir, I staid in Cordova about three weeks.

Q. What did you do in Cordova?

A. I stayed up here in one of Joe Diggs' houses.

Q. Did you do any work? A. No, sir. [53—26]

Q. Then the first work you did was for Mr. Heney and how long did you work for Heney?

A. A month.

Q. Then where did you go? A. To Chitina.

Q. What did you do at Chitina?

A. I cleaned off a part of the townsite there.

Q. That was owned by the Katalla Company?

A. I couldn't say who owned it.

Q. You took a contract from Mr. Exum there?

A. No, I took a contract from Mike Sullivan.

Q. He was working for the Katalla Company?

A. I couldn't say who he was working for.

Q. How long did you work on that job?

A. About ten or twelve days.

Q. What were you doing?

A. Clearing off a block of ground.

Q. Who else was working with you at that time?

A. A fellow named Jeru.

Q. And who else?

(Testimony of James Heney.)

A. And I had my brother working there—we put two men to work.

Q. Where is your brother now?

A. I couldn't tell you.

Q. Do you know where Jeru is?      A. No, sir.

Q. Then after you had completed that piece of work, where did you go to work?

A. I went to work for myself then.

Q. Day labor?      A. Putting up a cabin.

Q. Where did you put up this cabin? [54—27]

A. Chitina Heights.

Q. How long was it before you next went to work?

A. I had the cabin up and the dirt pretty near on when I went to work for McConnell and Deyo up the Kuskolina.

Q. How long did you work up there?

A. I worked there for two months.

Q. What kind of work were you doing?

A. Mining.

Q. Then you quit work there did you?

A. Yes, we got through there.

Q. Then where did you next start to work?

A. I next started to work—when I came back I went to work I think the other side of the Copper River doing some cribbing work.

Q. Railroad work was it?      A. Yes, sir.

Q. Where was this cribbing work being done?

A. I couldn't say whether it was that year I did the cribbing work or the next year—I don't recollect now whether it was that year or the next year that I did that cribbing work.

(Testimony of James Heney.)

Q. On the Copper River?

A. Yes, sir,—that winter I worked on the section for Mr. Palmer.

Q. You mean on a section of the railroad?

A. Yes, sir, at Chitina.

Q. While you were doing this cribbing work, were you drawing carpenter's pay?      A. Yes, sir.

Q. Working as a carpenter?

A. Working in the woods.

Q. When did you start working again, after you had finished this cribbing job and this work on the section? [55—28]

A. I started on the section—started to work again in April and worked for Gray in the Copper Mountain. That would be 1911.

Q. How long did you work for Gray?

A. A month.

Q. When you came back what work did you start doing?

A. When I quit Gray I went to work for George Davis up the Kuskolina.

Q. What doing?      A. Mining.

Q. How long did you work for him?

A. Another month.

Q. Then when you got through with that work, where did you start working?

A. I worked for Jim McConnell.

Q. How long were you working there?

A. July and August and part of September, 1911.

Q. Then where did you start working?

A. At home.

(Testimony of James Heney.)

Q. What were you doing at home?

A. Sawing wood.

Q. That is at Chitina?      A. Yes, sir.

Q. When did you next start to work?

A. I started in in the tunnel.

Q. The next work was the tunnel work?

A. Yes, sir.

Q. Now, while you were working on the section, what pay were you drawing?

A. I was drawing 35 cts an hour.

Q. \$3.50 a day?      A. Yes, sir. [56—29]

Q. Out of that you paid what board?

A. I don't know. I was boarding at home.

Q. You were charged one dollar a day for board?

A. Yes, sir.

Q. And you paid how much for hospital fees?

A. \$1.50 was kept out for hospital.

Q. That is per month?

A. \$1.50 a month; yes.

Q. Then you started to work in the tunnel. Did you draw a carpenter's pay while you were working in the tunnel?      A. Yes, sir.

Q. You were working as a carpenter, were you?

A. Yes, sir.

Q. And how long did you say you had worked on this section?

A. I worked there—I started in November, sometime, and worked there until about February, I think.

Q. Had you ever done any railroad work before that?      A. No, sir.

Q. You had worked for Heney?



(Testimony of James Heney.)

A. Yes, I had worked for Heney but not before I came to Alaska—I never done no railroad work.

Q. Any carpenter work—had you done that?

A. Very little—what I done for myself.

Q. When did you say you began working in this tunnel?

A. I began working there in November, 1911.

Q. And you were injured in January, 1912?

A. Yes, sir.

Q. What was your general work in that tunnel—what were you doing?

A. When I started in there first I was foreman getting out the dirt that caved in. [57—30]

Q. There had been an accident at this tunnel, had there not? A. Yes, sir.

Q. And the tunnel was closed up? A. Yes, sir.

Q. So the trains couldn't run through?

A. Yes, sir.

Q. Weren't you retimbering and strengthening this tunnel? A. Yes, sir.

Q. That was the work that you began at?

A. Yes, sir.

Q. At the time that you began in November?

A. When I started in November I went to take out the dirt out of the tunnel.

Q. Then you began as a foreman doing the work?

A. Taking out the dirt.

Q. That had fallen in this cave-in of the tunnel?

A. Yes, sir.

Q. Now, then, how long did you work at taking out this dirt?

(Testimony of James Heney.)

A. I couldn't exactly say the time,—about a month, I guess, as near as I can tell. It might be more or less.

Q. Had you been a foreman on the railroad work before that?     A. I was foreman for Heney.

Q. Drawing foreman's pay?     A. Yes, sir.

Q. From Heney?     A. Yes, sir.

Q. And at the time that you were working on the tunnel as foreman you were drawing foreman's pay from the Katalla Co?     A. Yes, sir.

Q. You were working about a month taking out the muck and dirt?     A. Yes, sir. [58—31]

Q. Why were you taking out this muck and dirt?

A. To get ready to put in some timbers, I guess.

Q. Then after you had worked there this month as foreman taking out this muck, what was your next work in that tunnel?

A. The next work, we went to lagging the tunnel, put in some lagging.

Q. Explain to the jury what you mean by lagging.

A. I was filling up between the timbers and the side of the wall—there was a space between them that I was filling up with this filling and lagging.

Q. In other words, the framework of the tunnel is more or less regular?     A. Yes, sir.

Q. And your lagging on the side—you were putting in lagging to fill in the space between the tunnel and the roof; is that correct?     A. Yes, sir.

Q. That is true over the top of the tunnel—that is, if the framework of your tunnel happens to be a foot or half a foot or two feet from the top of your

(Testimony of James Heney.)

tunnel, you fill in above that so as to fill the space in between the top of the tunnel and the roof?

A. Yes, we started at the bottom; we lagged up along the side with the first set of timbers and when we got through with that we went back to the other side and done the same thing and lagged across the top of the tunnel.

Q. You lagged up on each side of the tunnel behind the timbers and between the timbers and the roof and then lagged up over the tunnel?

A. Yes, sir.

Q. How long had you been working at that?  
[59—32]

A. Well, about a month, I think, as near as I can tell.

Q. Where did you get this lagging?

A. Part of it was hauled in there—it was old timbers, plank and ten by tens and such stuff as that—was hauled in there with the train and there was some more of it cut out in the woods.

Q. Who cut it out in the woods?

A. I have been out there cutting it in the woods.

Q. In other words the lagging is what you might call filling?     A. Yes, sir.

Q. Now, what was your next work after this lagging work?

A. We were putting in those braces—the next work we done was putting in those braces between the timbers.

Q. Putting in the braces between the timbers?

A. Yes, sir.

(Testimony of James Heney.)

Q. You had worked on this tunnel practically all the time that it was being reconstructed and re-timbered, were you not?     A. Yes, sir.

Q. You assisted in doing all of the retimbering and restrengthening of the tunnel, did you not?

A. I didn't do much of that timbering.

Q. You worked there on the timbering work—were you not filling in?     A. Yes, sir.

Q. And helping with the timbering?

A. Yes, sir.

Q. You had retimbered this tunnel, all, with the exception of about 6 ft., had you not?

A. Yes, I think there was a little piece on each end that was not finished there, too.

Q. You began retimbering this tunnel at what is known as the [60—33] east end, did you not?

A. I think so; yes.

Q. That would be the end towards the Kennecott mine?     A. Yes, sir.

Q. And you were timbering towards the west end, towards Chitina?     A. Yes, sir.

Q. Now, then, you had retimbered this tunnel up to within about say 6 to 10 ft. from the end, had you not, toward Chitina?

A. Yes, sir—there was about 8 or 9 bents of old timber that was left in there.

Q. That is on the Chitina end?

A. That is on the Chitina end.

Q. Then you were within about 6 or 8 ft. from meeting at that point?     A. Yes, sir.

Q. Now, you say there was a top floor to the

(Testimony of James Heney.)

tunnel?      A. Yes, sir.

Q. And you were working on that top floor?

A. Yes, sir.

Mr. RITCHIE.—I have here a postal card which might be used in the way of illustration. It is marked Plaintiff's Exhibit "A."

Q. I will ask you to look at Plaintiff's Exhibit "A" and ask you to show to the jury what you mean by the upper floor of the tunnel.

A. That is the regular tunnel here—the cave-in here (indicating.)

Q. Just answer my question: What do you call the upper floor of the tunnel?

A. This is the upper floor right here on top here.  
[61—34]

Q. The other portion is the lower floor, is it not, below that?      A. It is right down here.

Q. Right where the track runs?      A. Yes.

Q. What did you have on the floor of the upper portion of the tunnel?      A. We had lagging.

Q. Across your tunnel?

A. We had a flooring on that, we had a flooring on there.

Q. You had a flooring that extended clear back to the other end of the tunnel?      A. Yes.

Q. The face of that picture shows the end toward Chitina, does it not?

A. I couldn't say whether that shows the end toward Chitina or not, but that is the way the timber is in the tunnel.

Q. I will ask you to look at that derrick there in front and ask you if you do not recall that there was



(Testimony of James Heney.)

a derrick there at the time that you were working there.     A. Yes, sir.

Q. I will ask you if that derrick was not there on the day that you were injured.

A. Which place do you mean?

Q. At the point where you fell down?

A. No, sir.

Q. I don't think you understand my question. Wasn't it on the face of the tunnel?

A. This derrick here was used for raising the timbers and I think was on the east end of the tunnel.

Q. What end is that?

A. Next to the Copper River. [62—35]

Q. And there wasn't any on the west end there?

A. Not that I know of.

Q. Think for a moment and see whether you recall any derrick there?

A. No, I can't recall any derrick there.

Q. You swear there wasn't any derrick there?

A. I wouldn't swear to it—it may be but I can't recall it.

By the COURT.—At what point?

Mr. BORYER.—At the west end of the tunnel.

Q. Does that look to you like a picture of the west end of the tunnel?     A. Yes, sir.

Q. And you think that is the west end of the tunnel?

A. That I couldn't say, that it is the west end of the tunnel.

Q. You had seen the west end of the tunnel?

A. Yes, sir.

(Testimony of James Heney.)

Q. Don't you think from having seen it that you would recognize it?

A. Well, there isn't much difference in the timbers between the west end and the east end.

Q. You had seen that end often, the west end?

A. Yes, I had seen it several times.

Q. You had seen it there every day when you were working there?

A. Yes, when we were packing timbers.

Q. At the west end? A. All over the top.

Q. I think we are getting confused. You stated a while ago that you didn't think there was a derrick at the west end. Now, I will ask you whether you have changed your mind and do you now recall if there was a derrick at the west end.

A. Well, I couldn't recall whether it was there the day I got [63—36] hurt.

Q. Was it there the day before?

A. I couldn't tell.

Q. Had you ever seen it there?

A. The derrick was used there in putting up these timbers.

Q. As you put up a bent,—you would use that derrick for the purpose of pulling up the bent?

A. Yes, sir.

Q. How did you pull up that last bent?

A. I didn't pull up the last bent—I had nothing to do with pulling up those bents.

Q. How was it pulled up?

A. I guess by a derrick.

Q. Do you know whether it was or not?

(Testimony of James Heney.)

A. I don't know—they pulled them up on the floor, hoisted them up with a derrick.

Q. Did you see them pull that last bent up?

A. No, sir.

Q. Then you don't know whether there was a derrick there or not—you wouldn't say for certain?

A. I wouldn't say for certain whether that derrick was there the day I was hurt or not.

Q. What time in the day were you hurt?

A. Some time in the afternoon.

Q. Now, then, that bent was up there then?

A. This bent here? Yes, sir.

Q. Are you certain of that? A. Yes, sir.

Q. Did you see it there? A. Yes, sir.

Q. Did you see it the day you were hurt? [64—  
37] A. Yes, sir.

Q. How close were you to it?

A. Right alongside of it.

Q. Had you been alongside of it more than once?

A. I worked around it all that forenoon.

Q. Are you certain there was no railing there that forenoon? A. Yes, sir.

Q. You are certain of that? A. Yes, sir.

Q. You would have seen it if there was a railing there that morning? A. Yes, sir.

Q. And you say there wasn't a railing along there?

A. Yes, sir.

Q. You are positive of that? A. Yes, sir.

Q. You are positive you noticed that there wasn't any railing? A. Yes, sir.

Q. Are you certain there wasn't a railing on there the day before? A. Yes, sir.

(Testimony of James Heney.)

Q. You are positive of that? A. Yes, sir.

Q. How do you know there wasn't?

A. I should see it.

Q. Were you working around there?

A. Yes, sir.

Q. And you would have seen it if it had been there?

A. Yes, sir.

Q. And you didn't see it? [65—38]

A. No, sir.

Q. There was nothing to obstruct your view, so you could see whether there was a railing there or not?

A. No, sir.

Q. Do you know whether there was a railing there before that? A. No, sir.

Q. Did you ever put any lanterns there?

A. No, sir.

Q. Why didn't you?

A. Some of the rest of them would put a lantern there. I had no occasion to put it on—there was a lantern around these holes all the time.

Q. They would put them there before you got there; is that the reason?

A. One man is enough to put them there.

Q. If somebody hadn't put them there, would you have put them there? A. I guess I would.

Q. Why would you put them there?

A. I got orders to leave a lantern there any time that we would leave the hole.

Q. If you hadn't had orders and you didn't put a top over it—would you put a lantern there anyway?

A. It would be very dangerous if there wasn't

(Testimony of James Heney.)

a lantern there or covered over.

Q. Then you think you would put a lantern there to protect it?   A. Yes, sir.

Q. You think it would have been your duty to have done it?   A. I think it would.

Q. You were doing general work there, were you not?   A. Yes, sir. [66—39]

Q. You think, now, if you put a lantern there that you could have seen it, so people wouldn't fall down?

A. Yes, sir.

Q. Although a train was coming through?

A. Yes, if there was a lantern there I think a man could distinguish the light when he got close to it, when the train came through.

Q. Do you think you could on this day when you were hurt and the smoke came through that time?

A. How is that?

Q. Do you think you could on the day you were injured, with the smoke in the tunnel the train had left, at the time you were injured?

A. I had one in my hand that time.

Q. Do you think you could have seen a lantern there?   A. I think I could.

Q. And you think you could have seen a lantern at any other portion of the tunnel the same as you would at the hatchway?

A. Yes, when you get close enough to it.

Q. And you think if there had been a lantern at any portion of the tunnel, that altho the train was going through and had left the smoke in there that you described, that you could have seen it?



(Testimony of James Heney.)

A. No, not until you got close to it.

Q. But when you did get close to it you think you could have seen it? A. Yes, sir.

Q. Do you think you could have seen it a sufficient distance away so as to keep from falling down the hatchway? A. Yes, sir.

Q. How many men do you say were working there? [67—40] A. Four men.

Q. You were all doing the general work of retimbering and restrengthening this tunnel, were you?

A. Yes, sir.

Q. You were all four carpenters, were you?

A. Yes, sir.

Q. Now, then this top floor up to the point or place where you were injured, was all floored over?

A. Yes, sir, only this place where I was putting in this piece—this space between the timbers, that was left open.

Q. That wasn't lagging that you were putting in at the time?

A. I don't know what you call it. I call it lagging—that is what we call it in the mines, lagging.

Q. It was a brace, wasn't it?

A. It was put in there to close up the floor tight; in fact, I think it was put in there to help put the top set of timbers in place, in case any weight came on them.

Q. You had floored the top of your tunnel and between the posts—you hadn't sawed your board to fit between the posts? A. Yes, sir.

Q. And it was this that you were doing, wasn't it?

(Testimony of James Heney.)

A. Yes, sir.

Q. Then that would be more of a brace or would it be just a continuation of the floor being completed?

A. Yes, you could use it for a brace or for the continuation of filling the floor.

Q. As a matter of fact, when you floored up across your tunnel, if there was a post here you would let that go until you would get a piece to fit in like this?

A. Yes, sir.

Q. You say that one of the men would take the measurement, [68—41] one of the four men?

A. Yes, sir.

Q. And the other two men would saw this piece, these pieces? A. Yes, sir.

Q. And you would take the pieces and put them where they belonged and nail them down?

A. Yes, sir.

Q. Then that completed the work of you four men? A. Yes, sir.

Q. How long had this last bent been up?

A. Which one do you mean?

Q. I mean the last one over which you fell?

A. I couldn't say how long it had been up.

Q. Been up several days?

A. Yes, it had been up several days.

Q. Had it been up as many as four days?

A. Yes, more than that.

Q. How long had you four men been working up there on the top floor?

A. Well, we must be working there three weeks, I guess—maybe more or less.

(Testimony of James Heney.)

Q. That bent was put up then while you were working up there? A. I think it was.

Q. Did you see them raise it up there?

A. I didn't see them raise that bent up, no—I think I was out in the woods felling the wood at the time they raised this bent.

Q. But it was floored clear up to and touching that bent, was it not?

A. On the top of the first set the floor was in.

Q. The flooring was clear up to the edge of the bent where [69—42] you fell over?

A. Yes, sir.

Q. Now, then, about what distance were these boards on the floor apart?

A. What distance were they apart?

Q. Yes.

A. What do you mean? I don't understand what you mean.

Q. I mean the boards that went across your tunnel—how far were they apart, between the boards?

A. They were lagged up pretty tight, as tight as we could put them in.

Q. So they were put up touching each other?

A. If we could get them in that way; yes.

Q. What kind of flooring were you using?

A. Two or three inch lagging, I think; two or three inch plank.

Q. Foreign or native?

A. I couldn't say. I think it was foreign timber.

Q. You say you were working around these posts for several days, around toward the end of the tunnel?

(Testimony of James Heney.)

A. Well, we had been working back and forth there for two or three weeks,—we were doing the lagging on top and on the sides and this particular day, we just started there that morning.

Q. You had occasion to go up here so you could see whether there was a railing up there?

A. Yes, sir.

Q. When you got up here, could you see daylight?

A. Yes, sir.

Q. How far back could you see daylight?

A. You couldn't see very far back through the tunnel.

Q. About how far would you say? [70—43]

A. I should judge about maybe ten feet.

Q. So that if you were back here, back in the tunnel toward the Kennecott end—

A. Which do you mean—where do you mean you could see the light? When you looked down through the tunnel, down the track?

Q. Yes.

A. That is what I mean,—when you looked down through this hole, you could see the track down below, about ten feet back you could see.

Q. If you were standing back from the end where you fell over, about ten feet, you could see the daylight down through this opening where you fell?

A. Yes, sir.

Q. Could you see it further back than that?

A. No, you couldn't see it further back than that.

Q. Then you looked right out there easily, off this end?

(Testimony of James Heney.)

A. Yes, you could look down and see the track below.

Q. That is the end where you fell?

A. Yes, sir.

Q. As a matter of fact, that steep grade that you spoke of coming up from Chitina bridge at the end of the tunnel, the Copper River end, stop 600 feet before you get to that end of the tunnel, so that you are on water grade for 600 ft. before you get to the top?

A. I guess it was about that. I couldn't say.

Q. And the tunnel is on water grade?

Mr. RITCHIE.—We object unless you explain what water grade is.

Q. It is practically level there, is it not?

A. I don't know that it is level—I couldn't say it is level.

Q. You have been over the track repeatedly? [71—44] A. Yes, sir.

Q. You have walked through the tunnel repeatedly? A. Yes, sir.

Q. You have walked through the tunnel and down the incline over the Chitina bridge? A. Yes, sir.

Q. And you recall it is level for maybe 600 ft. beyond the other portion of the bridge?

A. I couldn't call it level because the water runs down that way all the time toward the bridge—there was a drain back there to drain the tunnel. I don't know whether it was level. I never put a level on it to find out.

Q. Do you know whether there is any grade there for 600 ft.?



(Testimony of James Heney.)

A. There must be a grade or the water wouldn't run out.

Q. But beyond that point, there is a decided grade?

A. Yes, sir.

Q. That is going toward the Chitina bridge?

A. The Copper River; yes, sir.

At 12 M. recess to 2 P. M.

Court reconvened at 2.

#### AFTERNOON SESSION.

Continuation of Cross-examination of JAMES HENEY.

(By Mr. BORYER.)

Q. I believe you stated that at first you had carbide lights in the tunnel for the purpose of getting light, so you could see; is that correct?      A. Yes, sir.

Q. Those carbide lights were taken out of the tunnel for the purpose of being taken down to bridge 75A where the rotary had had an accident?

A. Yes, sir.

Q. What did you use then as lights? [72—45]

A. We had lanterns and gasoline torches.

Q. After they had taken away your carbide lights?

A. We had gasoline torches and lanterns.

Q. How long did you work with those torches?

A. Well, I couldn't exactly say—off and on we would be out of gasoline.

Q. I mean about how long in time did you burn these torch lights, would you say for a week?

A. I couldn't say exactly.

Q. Three or four days?      A. Yes, I would say so.

Q. How would you place those lights?

(Testimony of James Heney.)

A. We would place them on one of the posts.

Q. How would you fasten them up?

A. Drive a nail in the post and hang them up on it.

Q. Did you ever hang any up?     A. Yes, sir.

Q. Just tell me how you would hang them up.

A. Simply drive a nail in the post and there was a hole in them, and put the gasoline light in on the nail.

Q. How many did you have, do you know?

A. I think we had two of them.

Q. Did that give you sufficient light to see to work?

A. Yes, sir; it helped some.

Q. When the train would come through, when you had those lights, could you see how to work then?

A. No; when the steam and smoke would be in there very bad, we couldn't see very well.

Q. That is, when the train would go through and the engine go through, the steam and smoke would come up through the floor?     [73—46]

A. Yes, sir.

Q. And you couldn't see how to work?     A. No.

Q. What would you do?

A. We had lanterns there that we would hang around and sometimes we would do a little work on the sets we were lagging—we had lanterns only, but could do a little lagging.

Q. You wouldn't continue working with the smoke up there?

A. Sometimes the smoke wouldn't be bad and we would continue working, but more times the smoke

(Testimony of James Heney.)

would be real bad and we couldn't continue work very well.

Q. And you stopped?      A. And we stopped.

Q. Because you couldn't see how to work?

A. Yes, sir.

Q. Because the smoke was too bad?

A. Yes, sir.

Q. You stopped because you couldn't see when the smoke was bad how to work? Now, then, would you stop work also?      A. Yes, sir.

Q. And would the other men stop work?

A. Yes, sir.

Q. As a matter of fact, when the smoke was bad, while you were burning your torches, you couldn't see how to work, could you?      A. No, sir.

Q. And the same thing was true when you had your carbide lights, wasn't it?

A. The carbide lights would throw a little better light than the torches.

Q. And if the smoke was bad you couldn't see how to work then? [74—47]

A. We couldn't work when the smoke would be real bad.

Q. Altho you had the carbide lights, you wouldn't work then, would you?      A. No.

Q. After the carbide lights had been taken away and the torches taken away, how long did you continue working with the lanterns that you were using?

A. Four or five days—about that, I guess.

Q. During those four or five days, that is all the light you had to see with while you were working?

(Testimony of James Heney.)

A. Yes, sir.

Q. And when the train would come through during those four or five days, would you stop working?

A. We stopped working this morning when the train—sometimes the train would come through and wouldn't throw as much smoke as other times; more times it came through and would throw an awful bunch of smoke; when the place was clear enough so we could see how to work, we would keep working.

Q. If you could see how to work, you would keep working? A. Yes, sir.

Q. And if you couldn't see how to work, you stopped working? A. Yes, sir.

Q. I believe you stated that sometimes when the smoke was bad that you walked back to the ladder and got down in the base or bottom of the tunnel?

A. Yes, sir.

Q. Did you ever do that before? A. Yes, sir.

Q. Why did you do that?

A. We got orders to do it.

Q. What orders was that?

First I will ask you— [75—48]

Q. From whom? A. Mr. Forrester.

Q. What orders was that?

A. He might have some timbers to take in and he would tell us to go down and take in those timbers and let the smoke get out.

Q. And he would tell you, then, when the smoke was bad in there to come down and when you came down, to take back some timbers.

A. He said, when the train was going through, and

(Testimony of James Heney.)

the smoke was bad up there, "We have some timbers to take in and we will take those timbers in and let the smoke clear out, until it clears off."

Q. The trains had been passing through there during these few months you had been working in this place?

A. Yes, since the time the dirt was taken out and they got the track straightened out they started to run the trains through there.

Q. I had forgotten how long you had been working above, on that upper floor?

A. I guess three weeks or close to a month.

Q. Trains had been passing through there every day or every other day?

A. Something like that.

Q. Sometimes there would be several trains through there a day?     A. Yes, sir.

Q. I understood you to say that you had no foreman that day.     A. No, sir.

Q. You four men were looking after the work yourselves?

A. Yes, Mr. Forrester came around there in the morning and told us what to do and we followed his orders. [76—49]

Q. Mr. Forrester was an engineer?

A. Yes, sir.

Q. Now, why would you stop work up there when the smoke was bad?

A. Well, it was kind of suffocating up there—we had to stop work, we could hardly breathe with it.

Q. Would you stand still or sit down?

A. Sometimes we sat down, but more times we



(Testimony of James Heney.)

would stand still and look for a place where the smoke wasn't coming up so bad and stand on that place.

Q. Other times you would sit down?

A. Other times we would sit down.

Q. And other times you would go down below?

A. Yes, sir.

Q. Mr. Forrester told you not to work while the smoke was in there and it was bad, I understood you?

A. No, he never told me. I don't remember his telling that.

Q. I understood you to say a moment ago he told you when the smoke was bad to come down and get timbers?

A. Yes, but he didn't tell us to stop work; we were working then.

Q. He told you to come out of there?

A. He told us to come down and get some timbers and let the smoke get out of there.

Q. I believe you stated that the engine blew her whistle before she came in. A. Yes, sir.

Q. And they were ringing the bell as they came in?

A. Yes, sir.

Q. And that two of the gentlemen were sawing the braces that you were putting in? [77—50]

A. Yes, sir.

Q. And as this train came in, after the whistle blew, he told you, one of them told you, to put in these braces; is that correct? A. Yes, sir.

Q. Could you hear him, what he was saying, with the bell ringing and the whistle blowing?

(Testimony of James Heney.)

A. Yes, sir.

Q. You could hear that?      A. Yes, sir.

Q. And after the bell rang and after the whistle blew this man told you to take this brace, these braces, and put them in where they belonged?

A. He had the brace already back there.

Q. Back where?

A. Back where they belonged, where I was going to put them in—he took them back himself when they were sawed.

Q. He had taken them back to that point?

A. Yes, sir.

Q. Had the train gotten by you before you started back to that point?      A. Yes, sir.

Q. The engine had gotten by you?      A. Yes, sir.

Q. And the smoke was up in front of you there?

A. Yes, sir.

Q. And then you started to walk towards the way the engine was going?      A. Yes, sir.

Q. And the smoke coming up in front of you all the time? [78—51]      A. Yes, sir.

Q. And you were going over there to put in those braces?      A. Yes, sir.

Q. And the train was entering the tunnel from the Kennecott end, coming toward Chitina; that is correct, is it?      A. Yes, sir.

Q. After the whistle had blown and the bell was ringing for the tunnel, someone told you to put in those braces and the point where you were going to put in those braces was down toward the opposite end of the tunnel, on the Chitina end of the tunnel—

(Testimony of James Heney.)

is that correct?     A. Yes, sir.

Q. Where were you standing when he told you that?

A. I was standing on the floor of the tunnel.

Q. How close to the place where they were sawing these timbers?

A. I guess about—I should judge about ten feet, maybe 6 or 8 or ten feet; something around there, maybe less.

Q. Approximately that?     A. Yes, sir.

Q. And after he told you this, and after the train had passed you and the smoke from the train had begun to come up through the floor, you started to walk towards the Chitina end of the tunnel?

A. Yes, sir.

Q. The same direction that the train was going?

A. Yes, sir.

Q. You could see the smoke as it was coming up?

A. Yes, sir; when it started to come up first I could see it.

Q. You continued walking then, expecting to get to the point, the place where you were to put in these braces?     A. Yes, sir. [79—52]

A. How far was that from where you started from, about?     A. About 20 or 25 feet.

Q. You had with you a lighted lantern?

A. Yes, sir.

Q. And did you have a hammer do you know, or not?

A. I couldn't recollect whether I had a hammer in my hand or not.

(Testimony of James Heney.)

Q. Now, then, you walked along and walked past the place where you were going to put in these braces, did you?

A. The braces were right alongside of the hole where I fell down, one was alongside of the hole.

Q. One was alongside of the hole?

A. Yes, there was nothing between the place where I was going to put this brace, but this post and the hole.

Q. You mean the hole at the end of the tunnel?

A. Yes, sir.

Q. And instead of stopping there, you stepped over it?     A. Yes, sir.

Q. And fell down on to the next floor of the tunnel?     A. Yes, sir.

Q. It was your intention to keep going in the same direction as the place you wanted to work?

A. It was my intention to go down to the place where I was working.

Q. And when you got close to this point where you wanted to put this brace in, did you stop and look around to see where you wanted to put it in, or not?

A. No, sir.

Q. Did you stop at any time after you started?

A. No, sir.

Q. You had your lantern with you at that time?

A. Yes, sir. [80—53]

Q. You had it lighted?     A. Yes, sir.

Q. Could you see the light of your lantern?

A. Yes, sir.

(Testimony of James Heney.)

Q. How much of a light did you throw out around you?

A. I didn't throw very much light around.

Q. About how many feet would you say?

A. I couldn't exactly say, because you couldn't see the floor the way the smoke was coming up through, it was coming up that thick.

Q. It was coming up so thick that the light of your lantern wouldn't permit you to see the floor?

A. No, sir.

Q. Then you couldn't see the sides?

A. If you were close to the side you could see the side—if you were close to it with a lantern.

Q. Were you close to it?

A. Yes, I walked down along the side.

Q. Could you see the side as you walked along?

A. Yes, sir.

Q. And you would see it all the way down?

A. Yes, sir.

Q. Could you see it to your right side?

A. There was the timbers along on the right side of me—I went down between two sets of timbers.

Q. How many feet could you see in front of you?

A. You couldn't see nothing down below where you were walking.

Q. You couldn't see the floor down there?

A. No, sir.

Q. You could see the side?

A. Yes, you might see a little in front of you with a light, [81—54 & 55] maybe a couple of feet would be as much as you could see ahead.



(Testimony of James Heney.)

Q. What hand did you have the lantern in?

A. In the left hand.

Q. That would be on the side that was walled up?

A. Yes, sir.

Q. How were you carrying it?

A. Carrying it along like that (indicating).

Q. In front of you?      A. Yes, sir.

Q. Then you could see a couple of feet in front of you?      A. Yes, sir.

Q. And could see the side?      A. Yes.

Q. Now, then, the floor was boarded up clear to the end of the side, was it not?      A. Yes, sir.

Q. Flush across on the end?

A. Right flush across the end.

Q. Are you certain that you saw the side all along as you walked?

A. I didn't look at the side all the time.

Q. Which way were you looking?

A. I was looking ahead of me.

Q. What were you looking ahead of you for?

A. So I could see where I was walking.

Q. And you had your eye and your mind on looking ahead?

A. My eye and my mind to go back there and put in the lagging where I was working—that was what I had my mind on.

Q. You were looking for that point? [82—56]

A. That is what I had my mind on; yes, sir.

Q. You are certain you didn't have your eyes closed?      A. I should say not.

Q. And you are certain you knew what you were

(Testimony of James Heney.)

doing?     A. Yes, sir.

Q. You didn't have your hand up against the wall feeling your way along?     A. No, sir.

Q. How close were you to the wall?

A. It was about four feet between these timbers and I was walking in the centre of that 4 ft.

Q. How close could you get to the wall—you could see the wall, could you?

A. There was about a foot each side of me, the timbers on one side, and the wall and timbers on the other side.

Q. You could feel it as you walked along?

A. Yes, as I put my hand out I could feel it.

Q. Now, after you fell through, I believe you said that someone took you from there on a cot or carried you up to your home?     A. Yes, sir.

Q. You were living close by?

A. I was living pretty close.

Q. Up on the hill, just around there?

A. Yes, sir.

Q. What way did they carry you?

A. I don't know how they took me out of the tunnel.

Q. I mean after—on your way up?

A. They got under my arms.

Q. And you put one arm around the shoulder of each man?     A. Yes. [83—57]

Q. And they braced you underneath?

A. Yes, sir.

Q. Did you sit on their hands or sit on a board or what?

(Testimony of James Heney.)

A. My arms were resting on their shoulder and they carried me that way.

Q. Did you walk on one foot or not?

A. No, I don't think I did.

Q. Did they keep you off the ground?

A. Yes, if I walked on one foot, the one that was dislocated, that was dragging, I guess; I must have had that off the ground.

Q. You don't recall whether you were walking with your other foot or not?      A. No, sir.

Q. Did they do anything to your hip down there before they took you home?      A. No, sir.

Q. After you went home they put you in bed, did they?      A. Yes, sir.

Q. Doctor Thom was called?      A. Yes, sir.

Q. Will you tell me what position you took in the bed?

A. I couldn't exactly remember what position I took on the bed; no.

Q. I mean as to your injured hip?

A. I think they let me lay on the broad of my back—I am not sure.

Q. Do you know which way your foot was pointed, was it pointed out or in?

A. I couldn't exactly say which way it was pointed.

Q. Which way did you carry it or keep it after you were in bed? [84—58]

A. After they set it you mean?

A. No, while you were in bed?

A. I couldn't tell you.

(Testimony of James Heney.)

Q. After the doctor came did you have it pointed out or in? A. I couldn't tell you.

Q. You were there in bed for some three weeks, I believe you stated? A. About six weeks.

Q. Now, during that time don't you remember which way your foot was pointed?

A. The six weeks? Yes, it was stretched out in the bed.

Q. Straight out? A. Straight out.

Q. But you don't recall whether it was stretched straight out before the doctor came or not?

A. No, sir.

Q. Were you etherized? A. Yes, sir.

Q. And your hip was put back in place?

A. Yes, sir.

Q. You say Doctor Council visited you?

A. Yes, sir.

Q. About when did he visit you?

A. I couldn't exactly say. I think it was two or three days after he came up there on the train.

Q. Has any other doctors ever visited you?

A. No, sir.

Q. Just Dr. Thom and Dr. Council? A. Yes.

Q. And have you consulted any other physicians in regard to it? A. No, sir. [85—59]

Q. How often did Doctor Thom see you?

A. Well, any time I would need him, that I was in very bad pain, they would call him and he would come down,—I couldn't say how often he was there. One day in particular my leg was just like it was crumbling up, and I couldn't stand the pain of it, and they

(Testimony of James Heney.)

sent up after him, and he got on top of the bed and sat down on my knee and straightened it out, and then got some snow and made a casing and put my knee in the snow and kept it there for probably half an hour or probably an hour until the snow all left it.

Q. That was where, on your knee?

A. Yes, right on my knee.

Q. Doctor Thom left there shortly after you were injured, did he not?      A. Yes, sir.

Q. About how long after, if you recall?

A. I couldn't tell you.

Q. About a month or six weeks.

A. I don't know. I wouldn't say for sure how long it was.

Q. Were you out of bed when he left there?

A. I don't know.

Q. While you were confined to your bed I believe you stated that you had some trouble with your bowels?      A. Yes, sir.

Q. I will ask you what kind of food were you eating during that time?

A. Some toast, a little tea and soft boiled eggs.

Q. On a regular diet, were you not?

A. I wouldn't eat very strong, not the same as if I was working.

Q. There wasn't anything wrong with your stomach, was there? [86—60]

A. Not a bit in the world.

Q. And there was nothing wrong with your digestive organs—you could eat anything you wanted to eat?



(Testimony of James Heney.)

A. I don't know—I was pretty weak for a long time.

Q. After a day or two you could have eaten other stuff, could you not?

A. Yes, sir, when I got all right, when I got strong I could eat anything.

Q. That is after a day or two?

A. No, not after a day or two.

Q. About a week?

A. No, it was more than that before I started in eating—it must be a month before I started in eating regular meals.

Q. But during that time while you were in bed, you ate eggs and toast and tea?     A. Yes, sir.

Q. Any bacon or ham?     A. No, sir.

Q. Why didn't you eat that?

A. I didn't feel like eating it.

Q. Because you didn't feel like it?     A. No.

Q. Don't you know that eggs are constipating?

A. I don't know. I eat quite a lot of them; they never bother me.

Q. During all the time that you were working for the company, while you were working on the section, etc., you were only drawing down \$3.50 a day—ten hours work at 35 cents an hour?

A. Yes, when I worked on the section.

Q. At this particular time you were doing a hazardous work and working as a carpenter and being paid \$5.00 a day? [87—61]     A. Yes, sir.

Q. Now, you built your little home up at McCarthy?     A. Yes, sir.

(Testimony of James Heney.)

Q. Cut the logs for it?      A. No, sir.

Q. You cut some logs, did you not?

A. I got men hired to do that work for me.

Q. Didn't you cut some of them?      A. No, sir.

Q. Didn't you bring the logs down to the building?

A. I helped take them down yes.

Q. What do you mean by helped?

A. I had a man hired with a horse, and I went out there and helped him.

Q. How many men did you have hired cutting the logs?      A. Two.

Q. Two men hired cutting the logs?

A. Yes, sir.

Q. And then did you bring the logs down?

A. No, not until later on.

Q. And you were helping taking them down?

A. Yes, I was up there along with the man with the horse.

Q. What sized logs were they?

A. A ten-inch face and from 4 to 6-inch tops.

Q. How long were they?      A. Some 26 ft.

Q. And you helped to build your home?

A. Yes; I was there when they were building it but I had two men on the building—I was around the building all the time.

Q. You were working with them all the time?

A. I was working with them a little. [88—62]

Q. You were working with them all the time?

A. Yes, I was there at the building all the time.

Q. And was helping to haul the logs up to the building?      A. Yes, sir.

(Testimony of James Heney.)

Q. The building is how high?

A. About 6 or 7 ft. high.

Q. How long?      A. 24 ft. long.

Q. You cut all the wood for your restaurant?

A. Yes, sir.

Q. Did you go out in the woods and cut that and then haul it in?

A. I did go out there and get a little wood and haul it in with the dogs.

Q. You do general work around your restaurant, do you not?

A. Yes, sir; hauling the wood and saw the wood.

Q. Didn't you help do anything else around there?

A. When we were rushed I would help my wife wash the dishes.

Q. How long have you had your restaurant?

A. Went up there a week before Christmas.

Q. Did you ever make a mush from 146 to Chitina?

A. Yes, sir.

Q. In the winter?      A. Yes, sir.

Q. Did you ever walk over Spirit Mountain?

A. I don't know where Spirit Mt. is—I don't know where it is. I did not.

Q. That is close to Chitina?

A. No, I never walked over it.

Mr. BORYER.—That is all. [89—63]

(By Mr. RITCHIE.)

Q. Just describe that platform floor a little bit, that is, as to the way the planks were laid on it, and also tell how many holes or hatches there were in it as near as you can remember.

(Testimony of James Heney.)

A. The planks were laid along the length of the floor. They were laid up and down pretty tight, and right between the posts there were places left open and along the centre of the tunnel there were some hatch holes there that were open where they used to hoist up this lagging.

Q. In laying the plank on them do they carefully frame the joists all the time?

A. Some places there were planks that didn't quite catch on, they would be too long and extend over between the sets.

Q. These lights, the first lights you spoke of, were acetylene lights, carbide lights? A. Yes, sir.

Q. And as long as they were burning it was easy to see all the holes and dangerous places?

A. Yes, sir.

Q. You told Mr. Boryer this morning that when you worked on the section you got \$3.50 a day and then you said something about \$1.00 for board—didn't you board at home? A. Yes, sir.

Q. Did you have to pay something for board?

A. No—Mr. Boryer meant if I stayed at the company camp—I would have to pay one dollar a day there.

Q. You would have paid one dollar a day for board if you stayed there?

A. Yes, sir—I think that is what Mr. Boryer meant.

Q. Mr. Boryer asked you some questions about coming down previously [90—64] when Mr. Forrester told you to, when the trains would come

(Testimony of James Heney.)

through and leave smoke. Do you mean that there was a standing order there or you came down when Mr. Forrester was there himself and told you?

A. When Mr. Forrester was there and he had anything to do, he would tell us to go down and we would do that when the smoke was in there.

Q. How big was this wood that you have been cutting for your restaurant?

A. It is small wood.

Q. You don't claim to be a helpless invalid?

A. No, sir.

Q. You only claim to be crippled to a certain extent? A. Yes, sir.

Q. Are you doing all the work you can?

A. Yes, sir.

Q. All the time? A. Yes, sir.

Q. And are willing to do it?

A. I am willing to do all I can.

Q. How much of a family have you?

A. I have one little girl.

Mr. BORYER.—We object to that as incompetent, irrelevant and immaterial.

Objection sustained. Plaintiff excepts.

(By Mr. BORYER.)

Q. I believe you stated that from what the doctors told you you believed you could never do any more work. A. I didn't make that statement.

Q. As a miner? A. Yes, sir. [91—65]

Q. What doctor ever told you that?

A. I didn't say the doctor ever told me that.

Q. Then the doctors didn't tell you that?



(Testimony of James Heney.)

A. No, sir.

Q. Did the doctors tell you anything about your future condition?     A. No, sir.

Q. Your counsel has asked you in regard to hatches or openings on the floor of this tunnel?

A. Yes, sir.

Q. It was your duty to close those hatches up after you had used them, was it not?

A. Well, I don't know whether it was my duty or not. I wouldn't be working at that all the time.

Q. If you were working there, you would do it—you didn't fall down either one of those hatches?

A. No, when I got through with them, if there was any lagging around there, I covered them holes up.

Q. He asked about the floor being joined at places—the floor was all right and safe to work on?

A. It was very risky there while they were putting in the timbers at places—it was all holes, in fact.

Q. You didn't fall down by reason of any of them?

A. No, sir, I did not.

Q. As a matter of fact, what you did was to walk off of the end of the tunnel, was it not?

A. Yes, sir.

(By Juror PEDERSEN.)

Q. Was it your custom, or rather did you have sufficient warning when the trains were entering the tunnel to go down as [92—66] a rule, and did you go down?

A. Yes. Mr. Forrester told us sometimes, when he would have some work for us to do on the outside, timbers to haul into the tunnel, he would tell us to go

(Testimony of James Heney.)

down and take in those timbers and let the smoke clear out, but when there was no work to be done, we didn't get any orders to go down.

Q. Even when Mr. Forrester was not there, was it your custom generally to go down if you heard the train in time to get down to avoid the smoke?

A. As a rule, we wouldn't be able to get down at the time we heard this train.

(By Mr. RITCHIE.)

Q. Mr. Pedersen means to ask you whether on some previous occasions you had heard the train in time to get down.

A. Yes, we did—we were too far from the ladder.

Q. On this occasion you didn't hear it in time?

A. No, sir.

(By Mr. BORYER.)

Q. How far were you from the ladder?

A. I should judge maybe 75 ft. or 50 ft.—50 to 75 ft.

Q. How far was the ladder from the end of the tunnel where the train entered?

A. It was about in the centre of the cave-in or a little more to the Copper River side.

Q. The tunnel is about 500 ft.? A. Yes, sir.

Q. I mean the tunnel proper. Now, then, you were about 50 ft. away from the ladder?

A. Yes, sir.

Q. And the ladder was about in the centre of the tunnel? [93—67] A. Yes, sir.

Q. Then the hole would be about 250 ft. away from the point where the engine entered the tunnel?

(Testimony of James Heney.)

A. I should judge so; maybe more than that—it might be 300 feet, 250 or 300 ft.

Witness excused. [94—68]

**[Testimony of W. H. Slimpet, for Plaintiff.]**

W. H. SLIMPET, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. Where do you reside at present?

A. Chitina.

Q. What are you doing just now?

A. Mining and prospecting.

Q. How long have you been in Alaska?

A. Ever since the 17th of Jany., '98.

Q. In different parts of Alaska? A. Yes, sir.

Q. How long have you been in this part of Alaska?

A. Since May, 1906.

Q. You worked for some time on the Copper River & Northwestern Railroad?

A. Off and on ever since.

Q. What has been your general business?

A. Construction foreman on the Copper River & Northwestern.

Q. You have done some mining?

A. Some mining.

Q. What were you doing in December, 1911, and January, 1912?

A. Working in the Chitina tunnel.

Q. What were you doing in the tunnel?

A. Well, after the dirt was removed I went to work

(Testimony of W. H. Slimpet.)

with the carpenters—first after the dirt was removed cut some timber to make lagging.

Q. Are you acquainted with the plaintiff?

A. Yes, sir.

Q. Were you working with him during the months I have mentioned?      A. Yes, sir. [95—69]

A. Yes, sir.

Q. All the time?

A. Not from the time we started—he was working night shift and I was working day shift.

Q. During the months of December and January you were working most of the time in the same crew with him?      A. Yes, sir.

Q. What were you doing in the tunnel in the latter part of December, 1911?

A. Some time probably about the middle of December we got through cutting the lagging and began to lag it up on the tunnel.

Q. When did you begin working on the platform, the top of the tunnel proper?

A. Toward the latter part of December.

Q. And from that time on you were working mostly on the platform?

A. Some days we would be on the platform and sometimes underneath, as the carpenters raised the timbers ahead of us—we were working on the lagging and flooring, carpenter work.

Q. How was the tunnel lighted in December, if at all?

A. We had two carbide acetylene lights and gasoline torches and common lanterns.

(Testimony of W. H. Slimpet.)

Q. When the acetylene lights were burning did it make a good light?     A. Yes, sir, a good light.

Q. The ones used there, were they powerful lights?

A. One was very large—it would throw a light easily 300 ft. with a reflector on it.

Q. Were those lights equal to the ordinary street light?

A. The largest would make a light equivalent to a small arc-light [96—70] in the city.

Q. How were the lights when these acetylene lights were burning?

A. They would make a bright light, the same as any electric light.

Q. You could see without any difficulty a certain distance?     A. Yes, sir.

Q. Did they take those lights out?

A. Yes, after the wreck of the rotary on 76, Mr. Forrester came up and I helped him take the larger one of the two down and take it over to the depot and load it on the train.

Q. About what time was that?

A. It was early in January. I wouldn't be positive of the date.

Q. Then how was the tunnel lighted for your work after that?

A. We had two gasoline torches. We used those as long as there was any gasoline, after that hand lanterns.

Q. How long did the torches last?

A. I couldn't say—one or two or four or five days.

Q. Do you remember the 19th of January—did



(Testimony of W. H. Slimpet.)

anything happen that day?

A. I couldn't recall any date.

Q. Do you remember when Heney was hurt?

A. Yes, sir.

Q. How long before the day that Heney was hurt had you been using hand lanterns?

A. Well, we had some hand lanterns all the time, but we had been out of gasoline for two or three days and possibly longer.

Q. And had been using those small hand lanterns exclusively?

A. Yes, sir, and we had one larger lantern, a kind of stationary lamp, with a reflector on it. I wouldn't be positive whether we had it then or not. We had them in [97—71] the tunnel—we had lanterns of various kinds.

Q. How many lanterns did you have the day Heney was hurt? A. Three.

Q. How many men were working that day?

A. Four—Henry Adler and I were doing the sawing. We had one light and Shorty was doing the measuring and Heney was putting in those pieces between the timbers. They were second-hand lumber, lumber that had been used, most of them 2x12.

Q. Do you know anything about a hole stretching clear across the tunnel toward the Chitina end?

A. Yes, sir.

Q. Describe that hole.

A. When they began to raise the timbers in the tunnel set, they began to raise it in the cave-in, over that end, and there was one set of timbers out there

(Testimony of W. H. Slimpet.)

and they raised from the Chitina end, going towards the Kennecott end, or Copper River end, and this place was left open.

Q. As long as you had the acetylene lights and torches could you see that hole?

A. If the lights were turned that way you could see it plain.

Q. Easily?

A. Yes, sir; if the lights were turned that way; we used reflectors on this acetylene light part of the time—we used the reflector to show the light one way; if it was back of the reflector you wouldn't see it so plainly, that is—unless it was daylight—you could see a little daylight from the hole.

Q. Were there any other holes on this platform?

A. Yes, this upper set of timbers was put up with five posts and with four sets, and taking the space in next to the wall [98—72] those holes were for hoisting lagging and whatever timber was thought necessary.

Q. How many of these hatches were there?

A. I couldn't be positive; they were putting in lagging as they needed them and the same on the other set.

Q. After you got down to hand lanterns were any of these hatches open?

A. We used one the day Heney got hurt.

Q. Where was that located?

A. The one that we used that day was about 35 ft. from the end of where this hole was or platform and it was on the north side of the tunnel, that is,

(Testimony of W. H. Slimpet.)

not in the outside set of timbers but the next set, about 35 ft. to the east from the west end of this opening.

Q. How did you get up on that platform?

A. Got up on a ladder between two sets of timbers.

Q. In what part of the tunnel was that ladder located?

A. At this particular time the ladder was located within about 40 or 50 ft. of the east end of the cave-in, on the south side of the tunnel.

Q. How far would that be from the big hole clear across? A. It would be at least 125 ft.

Q. And towards the Copper River side?

A. The ladder was towards the Copper River side; yes.

Q. After you got down to hand lanterns did you ever ask for any other lights—speak to anybody in authority about it?

A. Well, we spoke several times to Mr. Forrester, I did, saying we could use more lights.

Q. Were any other lights given you?

A. Not at that time. Later, after this, Mr. Foster and I [99—73] went down and took a headlight off of one of those dinky engines that set down by the depot. We did take it off afterwards and use it in the tunnel.

Q. At the time that you were using only hand lanterns, you spoke to Mr. Forrester about being short of lights. Now, what statement, if any, did he make?

A. I don't remember.

Q. On the afternoon that Heney fell through this

(Testimony of W. H. Slimpet.)

hole—about what time in the afternoon was it?

A. I should judge about the middle of the afternoon.

Q. What, if anything, happened just before he fell through?

A. The train came through from the Kennecott end—

Q. Describe the approach of that train and when you first noticed it.

A. We were working, sawing, and the train whistled just at the east portal of the tunnel and came immediately through and went on to Chitina and I was standing right where the sawing was—I don't know, I couldn't say, but I think Heney was on the opposite side, about 5 or 6 ft. from where I was but I neither saw Jimmy or Shorty—he was measuring at the time before the train came through and the next I heard—I heard somebody holler, "For Christ's sake, stand still! There's one man down already!"

Q. When the train went through, what effect, if any, did it have upon the tunnel and the air in the tunnel?

A. It always had more or less effect, of course. Various times the smoke wasn't bad as it was others—several times it seemed as if the fireman had just fired up and the smoke would be very black and suffocating, and it was on this particular occasion.

[100—74]

Q. How dense was that smoke and gas? Speaking relatively as to the amount of smoke thrown out

(Testimony of W. H. Slimpet.)

from an engine ordinarily, and the results of it?

A. You couldn't see a man at 15 feet any time.

Q. Was the gas noticeable?

A. There is always more or less gas in coal smoke.

Q. On previous occasions when the train would come through the tunnel, was there any rule or custom or order as to what was to be done?

A. Those things are usually met at the time. One time when we had timbers to get in, Mr. Forrester gave us orders to go down and also told the foreman to bring heavy timbers in; this time all the timbers except a few sets in the upper deck were in and in place, so we had nothing to do at this time except to bring in the flooring and that was in.

Q. Had you seen Mr. Forrester that day?

A. He was in the tunnel that forenoon.

Q. What did he do there that morning?

A. He is the man that gave us the orders to put in these fillers between the posts.

Q. Did he do anything further than to give you orders for the day's work?

A. Nothing that I recall.

Q. Did he come back after that during the day?

A. No, not until the accident happened; he came back then.

Q. How much light did you get from one of these small hand lanterns?

A. In a smoke like that it is a kind of red glow—you could hardly call it a light.

Q. When there was no smoke in there could you do ordinary work such as you were doing? [101—



(Testimony of W. H. Slimpet.)

A. Yes, we always moved our light right to where we were working—we shifted our lights so they would show where we were doing our work.

Q. You placed your lantern so as to throw light on your work?      A. Yes, sir.

Q. And after the smoke came from the engine into the tunnel the lantern showed as a red glow?

A. Yes, sir, that's all.

Q. Would it throw any light at all?

A. No, you couldn't say it would.

Q. Was there at that time or had there been previously any guard-rail on that hole, that went clear across the tunnel?

A. There wasn't at that time and had not been to my knowledge.

Q. Was there any light there?      A. No, sir.

Q. Were you ever given any light to place there?

A. No, sir.

Q. And you only had three lanterns that day?

A. We only had three lanterns that day.

Q. And required all three of them for your work?

A. Henry and I required one and the boys each one as far as I know—I don't know where the other two were. We just worked at this one particular hatchway sawing the lumber.

Q. If there had been a lantern placed low there, a lantern or a torch, in a sort of narrow hole or shaft right on the side of that big hole, could a man have seen it through that smoke, if he was approaching the hole?

(Testimony of W. H. Slimpet.)

Mr. BORYER.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception. [102—76]

A. If the light was one side of the tunnel and you were on the other, you couldn't have seen it—the smoke was too dense.

Q. If the light had been directly in front of you as you approached it?

A. Yes, you could have seen if there was a light there.

Q. Did you see Heney at the time the train came through?

A. He was working back of us—I don't remember whether I saw him or not. He was hammering; he was working between where we were working and this hole. Occasionally he would come over and get the planks we sawed off.

Q. After you heard the man calling out that somebody had fallen through the hole, what did you do?

A. We took the lantern and Shorty and I, Henry and I went down, walked up to the ladder and went downstairs.

Q. What did you find there?

A. When we got there the saw-filer and blacksmith they had Heney on his feet and he had an arm around each one of their shoulders and they had their arms around his waist and were trying to take him home, and Henry and I went over to the bunk-house and got one of those canvas cots used by the company and tried to use it as a stretcher, but he

(Testimony of W. H. Slimpet.)

couldn't stand it to lay down on it. We first used a push car—I don't know which we used first. He seemed to be in so much pain we couldn't do anything with him, and as I got to the mouth of the cut, I met George Hayes, and went to get the doctor and his wife and I met Forrester and told him Jimmy was hurt, and Doctor Thom had a hospital probably 50 or 75 ft. from where Heney lived, and as I went by I told him and asked him, "Shall we bring him here or take him home" and he said, "Take him home." [103—77]

Q. Who said that? A. Doctor Thom.

Q. Where was Heney's house?

A. Over on the Chitina heights, off from the town-site.

Q. That is on the hill?

A. It is south of the tunnel and east of the lake.

Q. On the hill through which the tunnel runs?

A. Yes, sir.

Q. What were the names of the men who picked up Heney?

A. Chris Likits was one of them and the other was John—a big fellow, a Scandinavian. I don't know his other name.

Q. Will you describe that hill and the way the tunnel runs through it, the hill at the east end of the town of Chitina through which the tunnel is bored to reach the Copper River side—going from the Chitina end to the Copper River side? In going from Chitina over to Copper River there is an open cut there and at present there is a tunnel or set of timbers outside of the tunnel proper—there is no dirt

(Testimony of W. H. Slimpet.)

on top of them—a distance of about 100 ft., and these are lagged up just the same as the tunnel is, and then you come to where the dirt is over it and as you went in at this time there were 8 sets of old timbers that had not been taken out or had been caved in.

Q. Describe the track and grade from the end of the tunnel down to Copper River.

A. It is downgrade from the end of the cut on the Chitina side to the Copper River; there is quite a heavy curve in the cut; when you get out it is still curved and the curve is very steep, I judge two per cent or more, going down to the Copper River.

Q. Do you know what the grade is coming into the tunnel and [104—78] through the tunnel?

A. I understood that Mr. Howell and probably Mr. Forrester told me it was one-half of one per cent coming in from the Copper River end.

Mr. RITCHIE.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. There is something like 600 ft. of a level before you get into the tunnel?

A. Something like that. I wouldn't be positive about the distance—not of a level, no, comparatively level.

Q. So then you start down an incline?

A. The track runs low going towards the Copper River from the depot.

Q. Now, then, I believe you said with the smoke in there it was practically impossible to see even a lantern?

(Testimony of W. H. Slimpet.)

A. You could see a lantern only at a short distance.

Q. Then the lantern would be giving out some light?     A. Certainly.

Q. Even in this smoke?     A. Yes, sir.

Q. During the time that you were working in there with these men, what work were you doing?

A. This particular day?

Q. Yes.

A. Henry Adler and I were doing the sawing, sawing up these lengths as Shorty came in and gave us the measurements.

Q. He would do your measuring then?

A. He measured them, came over and marked it off on the plank and we simply done the cutting.

Q. What kind of light was he using to do the measuring?     [105—79]

A. I think he had a lantern with him.

Q. The same as you had?     A. Yes, sir.

Q. And you were doing the cutting with this lantern?     A. Yes, sir.

Q. And he would mark the boards and you would follow the mark by this lantern?

A. Yes, we had a lantern right where we were working all the time.

Q. So you had sufficient light to do the work that was necessary for you to do?

A. Before the smoke came in there, that is we could do the work we were doing that day, that kind of work.

Q. This lantern gave you sufficient light to do all the work that you did the day before, did it not—



(Testimony of W. H. Slimpet.)

these lanterns gave you sufficient *work* to do the work the day before?

A. Well, they did—it was inconvenient, that is all. If we moved at all we had to pick up the light and move with it.

Q. You had plenty of light as you moved around through this tunnel?

A. Yes, if you carried the lantern you could see all right.

Q. If you had a lantern in your hand, with that smoke in there, how far could you see ahead of yourself? A. A very short distance.

Q. About what distance?

A. I don't think I could give an estimate correctly.

Q. Can you approximate it?

A. Looking down at the floor—I know I carried the lantern when we went out after Heney was hurt and to see the floor I had to stoop over and hold the light right over the floor, to [106—80] see the floor of the tunnel.

Q. Then would you say that you could see the light two feet? A. In what direction? Up?

Q. No, in front of you?

A. Yes, you could see two feet in front of you, holding the light in front of you—I think you could easily see it.

Q. Then if you could see it two feet, it would be throwing a light two feet ahead? A. Yes, sir.

Q. Would you say you could see it three feet?

A. No, I wouldn't say any particular distance at all.

(Testimony of W. H. Slimpet.)

Q. Would you say that you could see it five feet?

A. If you were packing the light with you, standing here you possibly could distinguish the timber, from one timber to another in the tunnel; this particular time, those timbers were 4 ft. centres one way and the other  $5\frac{1}{2}$ , I think.

Q. How far could you see the light ahead of you with the smoke as it was at that time?

A. You could distinguish a red glow at between ten and fifteen feet, I should judge; it wouldn't be what you would call a light—it would be more like a ball of fire.

Q. Do you know how thick the smoke was at the head of the tunnel that day where Heney fell?

A. No way of measuring it, the thickness or volume of it, that I know of.

Q. Do you know whether you could see down or not? . . . A. Looking down?

Q. Yes.

Q. You couldn't see looking down from where I was.

Q. Do you know if you could have seen if you had been down there? [107—81]

A. Down on the track you mean?

A. No, if you were at the end of the tunnel where Heney fell off?

A. I don't know; I was not there.

Q. You don't know how thick it was there, do you?

A. No, it was about 35 or 40 ft. from where I was.

Q. Then you don't know how thick it was where

(Testimony of W. H. Slimpet.)

Heney fell off?      A. No, sir.

Q. And don't know, if there had been a lantern there, if Heney could have seen it or not?

A. Not at that particular point. I am speaking of the place where I was at.

Q. You don't know how thick the smoke was down there where Heney fell off, at that end?

A. No.

Q. You don't know, if there had been a lantern there, if Heney could have seen it or not?

A. I couldn't judge about Heney's eyesight. Mine might be better than his, or poorer.

Q. If you don't know how thick the smoke was there—I am trying to find out whether you would know if you could see a lantern there.

A. That I couldn't possibly say—how thick the volume of smoke was in any part of the tunnel.

Q. You don't know whether you could see a lantern there or not?

A. I suppose the smoke was about the same all along.

Q. That is based on supposition?

A. Yes, that is judging from what it was where I was.

Q. How far could you see where you were standing?

A. I thought you could probably distinguish the glow of a lantern ten or fifteen feet. [108—82]

Q. How far could you see a man from where you were standing?

A. You couldn't see a man at 15 ft.—you couldn't

(Testimony of W. H. Slimpet.)

make out his outline at 15 ft.

Q. How far could you see him?

A. I didn't have a man in position to see, I couldn't say—I couldn't see the second set of timbers and that was 8 ft. off.

Q. Could you see the first set?

A. Yes, sir. I could almost touch them; that was 3½ ft. off.

Q. Where was Henry?

A. Standing kinder between them at one time. I don't know where he was at the time of the accident. We both had hold of a crosscut saw when the train came in.

Q. Could you see Henry?

A. At the time the accident happened?

Q. Yes—when the train went through, with the smoke in there?

A. What particular time?

Q. At the time that Mr. Heney fell down?

A. I couldn't see him at the time that fellow hollered.

Q. You couldn't see who?      A. Henry.

Q. How far could you see then?

A. I couldn't distinguish a man at 15 ft. I don't know how far you could see because there was no particular object to look at.

Q. Could you see anything else?

A. I could see the nearest post in this upper set of timbers.

Q. You say you are a construction foreman?

A. I worked so for the Katalla Company and M.

(Testimony of W. H. Slimpet.)

J. Heney for four seasons, a little better than that.

Q. Are you working for the Katalla Company now? [109—83] A. No.

Q. Are you working for anybody now?

A. Myself, since last fall. I worked for the Katalla Company or the Copper River & Northwestern last fall during the tie-up.

Q. If Mr. Heney said he could see at that end three feet or two feet with his lantern, do you mean to say he is mistaken? A. No, sir.

Q. You don't mean to say he is mistaken?

A. No, sir.

Q. And if Mr. Heney said he could see the sides, you don't mean to say he was mistaken?

A. I don't know where Heney was.

Q. You don't know what he saw?

A. No, I couldn't judge—there was probably thirty feet between us.

Q. You spoke about the hole at the end of the tunnel—that was the end of your bents across there, was it not? A. Yes, sir.

Q. In other words, that compared with the outside edge of a roof, did it not?

A. Of a flat roof; yes.

Q. Now, then, if you were working on a reef, a flat roof, would you put a railing around the roof?

A. I wasn't in charge of this work.

Q. I say, would you?

A. In what capacity would you expect me to be laboring?

A. I would expect you to be laboring up there as



(Testimony of W. H. Slimpet.)

a tinsmith or a man who was putting work on a roof, putting on different kind of roofing, say.  
[110—84]

A. Finishing the work—they couldn't use a railing at that kind of work.

Q. Did you ever see them put a railing around a roof on a building—when they were putting a roof on a building?     A. No, sir.

Q. You wouldn't do it?

A. No, I wouldn't put one on a building.

Q. Did you work on the other end of the tunnel?

A. The other end of the cave-in?     Yes, sir.

Q. Were you one of the foremen?

A. Taking out the dirt I was foreman, but not after we got into timber work, until after this accident—I raised timber for a day or two, or a day and a half after this, when Mr. Lee was laying off.

Q. Did you know there wasn't a railing on there the day before this accident?

A. I know I never saw a railing on there.

Q. Why didn't you put one on?

A. Had no orders to.

Q. Did you think it was dangerous?

A. I consider any open hole in a dark room dangerous.

Q. Did you call anybody's attention to it?

A. No, sir—that is, not anybody in charge—might often have talked about these hatchholes and insufficient light and poor covering.

Q. Don't you cover these hatch-holes after you use them?

(Testimony of W. H. Slimpet.)

A. Sometimes we don't have timber to cover them completely; they were 5½ ft. wide, but sometimes we had three 12-inch boards over them.

Q. Didn't you have timber around the outside of the tunnel?

A. There is timber out there, undoubtedly.  
[111—85]

Q. Did you bring any timber in to this hatch-hole? A. Me? No.

Q. You could have gotten timber to cover this hatch-hole, could you not?

A. I wasn't running the works.

Q. What were you doing?

A. At that time I was working part of the time as carpenter; sometimes I would be out framing with the carpenters and sometimes putting in lagging, and this particular day was fixing the floor.

Q. And you don't think it is your duty to protect yourself and your fellow-men when you are working?

A. How is that?

Q. Do you think it is your duty to protect yourself and to protect your fellow-men when you are working?

Mr. RITCHIE.—We object to that as irrelevant and immaterial.

By the COURT.—He may answer.

A. If I had charge of the work I undoubtedly, if I thought the place was dangerous, would try to fix it. When I went to work on this dirt work Mr. Forrester told me to be very careful of anybody working there—that is when I was foreman—and

(Testimony of W. H. Slimpet.)

try not to have any more accidents in the tunnel.

Q. Yet you saw this opening and wouldn't fix it?

A. I didn't have anything to fix it with.

Q. There was timber around there?

A. Any man working up above didn't have a right to go out and get a stock of timber every time he wanted it.

Q. Who told you not to do it?

A. No one—no one told us to do it.

Q. You are a construction foreman?

A. Of dirt work, yes, sir, not of timber work.

[112—86]

Q. When this train went through there and this smoke got to the point where you were standing, what did you do?

A. I stood about still, as near as I can remember.

Q. Why did you stand still?

A. I figured it was too dark to go down if I wanted to and that was the safest thing to do.

Q. That was the safe thing to do—stand still?

A. So I considered it.

Q. And you stood still?      A. Yes, sir.

Q. What did Heney do?

A. I don't know—I don't know whether he was there just when the smoke got to us or not. I didn't see him for quite a little while.

Q. What did Heney do?

A. I couldn't tell you that.

Q. Are you the man that told him to take that timber or told him to go down and fix that place?

A. I am not.

(Testimony of W. H. Slimpet.)

Q. But you stopped your work when the train went through?

A. I couldn't see a line to do any sawing with.

Q. When was it you heard this remark, "For Christ's sake, stand still!"

A. It was shortly after the train went through.

Q. After the smoke had gotten past you?

A. Yes, I think the train was out of the tunnel, possibly a minute or some such a matter. I didn't pay any particular attention to it because I was rather excited when I heard the remark, a man naturally would be.

Q. You were excited?

A. After the remark. [113—87]

Q. Why were you excited?

A. I wondered who had fallen. There was no one in sight. I couldn't see any one of the other three just at that time.

Q. Now, then, I believe you stated that you had been given instructions that when trains came through there and it was smoky for you to go down, did you not?

A. When we had something to do downstairs, yes, sir.

Q. When you had something to do downstairs—do you mean that? A. Sure I mean it.

Q. As a matter of fact, were you not told when the train came through there to go down?

A. I was not.

Q. And while you were down, to perform some work down there?

(Testimony of W. H. Slimpet.)

A. No, sir, you have got it wrong.

Q. Haven't you got it wrong?

A. No, sir, no chance.

Q. The only time you went down then was when the train went through, was it not?

A. No, sir, we went down lots of times and brought in timber when there was no train around—when the timber-men or the outside men were short, we would go down and bring in timbers.

Q. You could go down?

A. In what respect?

Q. When the train started into the tunnel, you could go down?

A. A person is always at liberty on any work to go any place for a certain length of time, provided you are back—you don't have to go and ask for an excuse to go any place, if you are gone a reasonable length of time.

Q. Well, you could have gone down when the trains came through. [114—88]

A. Yes, if you had something to do—if we didn't, we would have to come back up.

Q. If you were working, you could go down, couldn't you? A. Yes, sir.

Q. Could go down into the lower part of the tunnel? A. Yes, sir.

Q. When the trains went through there before, and the smoke was dense, would you stop working?

A. For a short time, yes, sir.

Q. And until it had cleared up?

A. Until it was partially cleared up.



(Testimony of W. H. Slimpet.)

Q. About how often would the trains run through there?

A. Well, she used to run through going up to Chitina, occasionally she double tripped it, the hill—that would make three trips there through the tunnel, and coming back; if she was hauling ore she would make possibly three trips,—I think probably she might have had to make two round trips, that would make five single trips through the tunnel—on one occasion I think she probably did.

Q. Were they going through there every day?

A. No, not every day. I don't think the trains were making but three round trips to Kennecott at that time,—I wouldn't be positive of that.

Q. When you had your large lamps in there, were the trains running through then?

A. Yes, sir; part of the time.

Q. And would they make much smoke then?

A. Sometimes they made lots of smoke.

Q. How far could you see?

A. Well, it depends; if you were looking at the lamps you [115—89] could see quite a ways, and if you were looking away from the lamps, you couldn't see so far.

Q. Did you ever go down, then, and bring up timbers?

A. We followed the practice of going down and bringing up timbers until the greater part of the large timbers were up—followed it to a certain extent; for some time before this the large timbers, the square timbers, were all up except a few, five sets,

(Testimony of W. H. Slimpet.)

I believe, that were raised the next day after the accident, and the caps of those were up.

Q. When you had the large lights there and the trains would come through and the smoke was dense, would you go down stairs, down in the tunnel?

A. If a person happened to be close to the ladder they sometimes went down, sometimes part way down the ladder; sometimes there would be three or four on the ladder—would go down part way, stand there a few minutes and then go back—didn't always go clear down to the track.

Q. How far were you working from the point or place where you came up the ladder?

A. Well, a little bit over 100 feet, I should judge—possibly as much as 125 ft.

Q. Mr. Heney says 50 or 75 ft. Who is right?

A. If I remember correctly, the cave-in is 180 ft. long, and the ladder was about 40 to 60 ft. from the east end of it, and we were working back within about 35 ft. of the west end of it; therefore, it would be about a fraction over 100 ft., I should judge.

Q. A fraction over 100 ft. from the place where you were working to the ladder where you went down?

A. Yes, sir. [116—90]

Q. How far was the ladder where you went down from the end of the tunnel where the train entered, coming from Kennecott?

A. You mean the tunnel proper or the cave-in?

Q. I mean the place where she whistled.

A. The ladder would be about 220 ft. west of the

(Testimony of W. H. Slimpet.)

east entrance to the tunnel.

Q. Then the train would have to come some 200 ft. and you would have to go 100 ft.?

A. Yes, sir; something over 100 ft.—that is about right.

Q. Do those trains run slowly or rapidly through that tunnel?

A. At a very ordinary speed, not fast and not real slow—it depends on the condition of the track; they were not going at a very fast speed.

Q. How fast would you say?

A. I would have to be out where I could see them to make an estimate.

Q. You saw the smoke coming up and it was traveling as fast as the train?

A. Yes; it wouldn't take but a very short time to run the length of this cave-in.

Q. Was it running six miles an hour?

A. I wouldn't make an estimate on it at all.

Q. Didn't they usually go through there very slowly?

A. They went through slow—six miles an hour is slow.

Q. They were coming up a steep grade?

A. Not when they were in the tunnel—as I said, I believe it is one-half of one per cent in the tunnel.

Q. Don't you always go through a tunnel slowly?

A. Always, yes.

Q. And didn't they always go through there slowly?

A. Yes—six miles an hour is slow. [117—91]

(Testimony of W. H. Slimpet.)

Q. You say you spoke to Mr. Forrester about the light and got a light off of a dinky engine?

A. You got that wrong. We were talking about a light and I don't remember whether I spoke to him that particular day about the light or he did, but he mentioned the fact that there was one on a dinky engine that was down below the depot, and I went down, and whether that was the time or not, but we did not have a light off the dinky engine?

Q. What day was that?

A. I don't remember.

Q. Was it before or after the accident?

A. I don't remember the exact date when we got it, but we did have a headlight off the dinky engine; I remember that.

Q. If you did get a light, what did you do with it?

A. Took it up in the tunnel—timber handling and flooring, being lots of motion, would upset a lantern and break the globe.

Q. You think he got you a light off of one of the engines? A. I took the light up.

Q. Where did you put it?

A. I sent it up on a hand line up in the tunnel.

Q. What is a hand line?

A. An ordinary piece of rope you use in raising and lowering light objects.

Q. Why didn't you put it at the end of the tunnel?

A. We were working up above.

Q. Why didn't you put it out where Heney fell down?

A. That wasn't what we got it for; we got it to

(Testimony of W. H. Slimpet.)

work by. Up to that time we were working further up ahead in the tunnel nearer where the ladder was.  
[118—92]

Q. You don't want the jury to understand that you were foreman than on that work at that time?

A. No, in the timber work, no—I never said I was, no, sir.

Mr. BORYER.—That is all.

Redirect Examination.

(By Mr. RITCHIE.)

Q. Did you do any work there except under orders from Mr. Forrester or his foreman? A. No, sir.

Q. When this particular train came through, did you have time after you first noticed it coming to reach the ladder and get down?

A. I don't think we would have had time, if we started immediately after the train whistled, to have got to the ladder.

Q. Where was the train when it whistled?

A. It was about the portal of the tunnel, as near as I can judge. It whistled and immediately after that it was in the tunnel.

(By Mr. BORYER.)

Q. Did you try to get to the ladder?

A. No, sir; I did not, personally.

Q. You don't know how fast the train was running? A. I believe I made the remark I did not.

Q. Then you don't know whether you could have gotten to the ladder or not?

A. No, I have never made the attempt.

Q. Why didn't you go?



(Testimony of W. H. Slimpet.)

A. As a rule, when the train was in the tunnel we had very little time to get any place and the floor was bad in some places—we had to go past some of these hatch-holes that were not very well covered, and I thought the best thing to [119—93] do was to stay where we were at.

Q. Mr. Heney testified they were covered?

A. They were covered in a way—sometimes they were covered solidly and sometimes only partly.

Q. There were four of you working there?

A. Yes, sir.

Q. If you saw that hatch open it would be your duty to cover it?

A. The hatch we had just got through covering.

Q. Had you covered that?

A. Whenever we had lumber to cover them with, we covered them.

Q. You covered this one well?

A. We had lots of lumber.

Q. Do you know whether the others were covered?

A. Some of them were covered a few times, but at that particular time, I don't know.

Q. Had you been working around the others?

A. Various times—one day we worked one end and another day we were working at another, whenever the foreman sent us.

Witness excused. [120—94]

**[Testimony of Henry Adler, for Plaintiff.]**

HENRY ADLER, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name?     A. Henry Adler.

Q. Where were you working in December, 1911, and January, 1912?     A. In the Chitina tunnel.

Q. With whom were you working?

A. I was working for the Copper River & Northwestern Railroad.

Q. With what men were you working?

A. With Heney and Mr. Slimpet and another man, I don't know his name—we called him Shorty that time.

Q. And you say you were working for the Copper River & Northwestern Railway Co.?     A. Yes, sir.

Q. From whom did you get your pay?

A. I don't know. I never took any notice of the checks I got.

Q. What were you doing generally?

A. We were timbering and lagging the tunnel.

Q. How was that tunnel lighted, if at all, in December, 1911, and the early part of January, 1912.

A. Well, we had two big carbide lights for a time and later on we only had some gasoline torches, and we ran out of gasoline that time and only had coal oil lights—common lanterns.

Q. Do you remember the day Heney was hurt?

A. Yes, sir.

Q. Who was working up there that day?

(Testimony of Henry Adler.)

A. Billy Slimpet was working there and Heney and this other man—I don't know his name—and myself. [121—95]

Q. How many lights, and what kind of lights did you have up there that evening?

A. We had some coal-oil lanterns.

Q. Small hand lanterns? A. Yes, sir.

Q. How many did you have?

A. Two or three—I am not sure.

Q. Do you know anything about a hole extending clear across the roof of the tunnel proper?

A. Yes, sir.

Q. How far was that from the entrance to the tunnel, the Chitina end?

A. I should judge about 30 ft.

Q. Do you remember what time of the day Heney fell and was hurt?

A. I don't know—I don't remember the date.

Q. Do you remember the time?

A. It was in the afternoon between 2 and 4—I am not sure.

Q. Just before he fell through that hole—how far were you working from that hole?

A. From the place where he fell?

Q. Yes.

A. About 35 ft.—between 25 and 35 ft.; I couldn't be sure.

Q. And you had three lanterns at that time?

A. Yes, sir.

Q. Were you familiar with the hole in a general way—you knew it was there?

(Testimony of Henry Adler.)

A. Yes, sir; I know it was there.

Q. Did you ever have a guard-rail around that hole at any time? A. Not in my time.

Q. On either side of it? [122—96]

A. No, sir.

Q. Did you ever have a light at it?

A. No, sir; not that I remember.

Q. Just before Heney fell, did any train come through that tunnel?

A. Yes, the train went through just before he fell, I guess,—I didn't see him fall.

Q. Coming from which way? A. Kennecott.

Q. Was it a loaded train? A. I am not sure.

Q. What was the effect of that train passing through, if you know?

A. The smoke came up pretty thick.

Q. And after the train went through and the smoke was there, what effect did it have upon your ability to see things?

A. You couldn't see anything for quite a while.

Q. What did you do?

A. We just waited so the smoke would clear away.

Q. Where did you come up to the platform to work at that time? A. Came up on a ladder.

Q. How far was that from where you were working?

A. 100 or 115 ft., something like that; I am not sure.

Q. The ladder came up through the hatch?

A. Yes, sir.

Q. When did you get word that Heney had fallen?

(Testimony of Henry Adler.)

A. It was a few minutes after the train went through, somebody hollered below to watch out up there and be careful, somebody dropped through.

Q. And what did you do then?

A. We went to look for the ladder and when we found the ladder [123—97] we went down.

Q. And did you see Heney when you got down there? A. Yes, sir.

Q. Where was he and what condition was he in?

A. Likits and the blacksmith, I don't know his name, were holding him up.

Q. Did you help take him up to the house?

A. I was there but Likits and another man had him and tried to carry him up in a canvas bunk but he couldn't stand that and they had to carry him up there.

Q. How far could you see through that smoke with one of these lanterns you had?

A. For a while you couldn't see anything.

Q. If one of these lanterns or one similar to it had been hung up at the place where Heney fell through, could you have seen it on approaching it?

A. You would have to be pretty close to it.

Q. You could have seen it before you reached it?

A. Yes, sir.

Mr. RITCHIE.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. Do you know how dark it was when Heney fell off, at the time he fell off?

A. No, sir, I do not.



(Testimony of Henry Adler.)

Q. Then do you know if you could see a light or not?

A. If it was just as dark as where we were standing, he had to be pretty close to it to see the lantern.

Q. You think the darkness was just the same at the point where he fell off, as where you were?

A. I expect so.

Q. You are not sure? [124—98] A. No.

Q. Could you see your lantern?

A. Yes, you could see it—I could just see the light of it, that is all.

Q. You took your lantern to find the ladder hole as soon as you heard this cry? A. Yes, sir.

Q. And you went down the ladder with your light?

A. Yes, sir.

Q. And you found your way to the ladder with your light? A. Yes, sir.

Q. And you started just as soon as you heard this cry?

A. Yes, we started out to find the ladder.

Q. Then, as a matter of fact, you started for the ladder just as Heney fell down?

A. No, as soon as somebody hollered—I don't know when Heney dropped.

Q. As soon as somebody hollered you started?

A. Yes, sir.

Q. And you found the hole with your lantern?

A. Yes, sir.

Q. What were you doing when you heard this cry?

A. Wasn't doing anything.

Q. Standing still? A. Yes, sir.

(Testimony of Henry Adler.)

Q. Why were you standing still?

A. Because we couldn't see anything.

Q. Had you been instructed to stand still or what instructions, if any, did you have in regard to your work there when trains went through?

A. Well, on one occasion Mr. Forrester instructed me something [125—99] like that.

Q. What did he tell you?

A. He told me when the smoke was pretty thick to stand still.

Q. To stand still and not work?      A. Not work.

Q. And what about coming down out of the top?

A. You mean coming down when the smoke was thick?

Q. Yes.      A. Didn't say anything to me.

Q. It wasn't necessary was it for you to come down?

A. Never gave me any orders about that.

Q. It wasn't necessary for you to come down just so you stood still—that was all that was necessary?

A. Sometimes we went down.

Q. Why did you go down?

A. We went out in the yard and worked there awhile until the train came back.

Q. Why did you go down?

A. Because the smoke was thick in there and you couldn't work and couldn't see.

Q. Did you leave before the train went through or after?

A. Sometimes we left before the train went through.

(Testimony of Henry Adler.)

Q. How did you know the train was coming through?

A. Mr. Forrester knew it, I guess.

Q. Was Mr. Forrester there to tell you the train was coming through?

A. Sometimes he did.

Q. How would he know?

A. He ought to,—he is an official of the company and he ought to know.

Q. How does he know when they run the trains?  
[126—100]

A. He found it out from the depot.

Q. Was he upstairs when he told you?

A. Yes, he came up and told the foreman.

Q. He would hear the whistle, would he?

A. No, he would come up before the whistle would blow.

Q. And tell you to come down?

A. Yes, to work in the yard.

Q. Where was Heney standing when you heard the whistle blow?     A. I don't know.

Q. Was he standing close to you?

A. No, I could hear him working but I don't know where he was at the time.

Q. Now, then, you and Slimpet were working there together sawing these boards?     A. Yes, sir.

Q. Where was Shorty?

A. Shorty was right behind me scratching—measuring, I mean.

Q. Could you hear all of the conversations that took place between you and Slimpet and the other

(Testimony of Henry Adler.)

men there—between Slimpet and the other men?

A. I think I could have heard anything.

Q. How far apart were you?

A. Shorty was about 8 ft. from me, I should judge.

Q. And what was he doing?

A. He was measuring.

Q. You and Slimpet were sawing?      A. Yes, sir.

Q. There was nobody else up there at the time?

A. No, sir.

Q. Nobody else around there?

A. Yes, there was one man down below. [127—

101]

Q. They were not working with you people?

A. No, sir—yes, in a way—Mr. Likits was working with us in a way.

Q. Down below?

A. Down below—he was loading the lagging.

Q. How far away from you was Likits?

A. About thirty feet, I guess.

Q. About 30 ft. below?      A. Yes, sir.

Q. Did you hear anyone tell Heney to go over there and put in this brace?      A. No, sir, I did not.

Q. You were there with Slimpet and Shorty?

A. Yes, sir.

Q. And if anyone had told him to do that, you could have heard it, could you not, either one of these three men?

A. I might and might not have taken any notice of it.

Q. But there was nobody else there but you four boys, working there?      A. No, sir.

(Testimony of Henry Adler.)

Q. How long did it take you, after you heard this cry, before you got down?

A. A few minutes.

Q. You had to go over to the ladder, crawl down the ladder and then come back?     A. Yes, sir.

Q. About, would you say, a minute or two?

A. Two or three minutes.

Q. Who went down with you?

A. We all went down that time. [128—102]

Q. Slimpet went down with you?     A. Yes, sir.

Q. And Shorty went down with you?

A. Yes, sir.

Q. Did you all go down the ladder about the same time?

A. I was the first man to go down and the rest of them followed as soon as they got to the ladder, I guess.

Q. Did you have any trouble getting to the ladder?

A. Yes, it was pretty hard to find.

Q. Did you have a lantern?

A. Yes, sir, I had a lantern.

Q. How long did it take you to get to the ladder?

A. A minute or two.

Q. How long did it take you after you got down the ladder?

A. It wouldn't take very long—it was light below, you could see where you were going.

Q. Did you take your lantern below?

A. Yes, sir.

Q. You were working for the Katalla Company then? Drew Katalla Company checks?



(Testimony of Henry Adler.)

A. I don't know what kind of checks I drew that time—I know I worked for the Railroad Co.

Q. You don't know what company it was?

A. No, sir.

Q. You don't know who you were working for?

A. I don't know whether it was the Katalla Company or the Copper River & Northwestern Railway Co.

Q. But when you state that you were working on the Copper River & Northwestern, you mean that you were working on the roadbed that they call the Copper River & Northwestern roadbed? [129—103]

A. I suppose so.

Q. But you don't know whom you were working for? A. No, sir.

At 3:50 recess to 4.

Court reconvened at 4 P. M. Jury all present.

Continuation of Cross-examination of HENRY ADLER.

(By Mr. BORYER.)

Q. At the time you were using these lights—that is, the large lights—they were taken down to Bridge 75A, were they? A. Yes, sir.

Q. And then you used the torches, did you?

A. Yes, sir.

Q. And you say you ran out of gasoline?

A. Yes, sir.

Q. The road was tied up then, was it?

A. I don't know—I am not sure. It might have been—I am not sure.

(Testimony of Henry Adler.)

Q. Were there any trains running into Chitina from Cordova?

A. I think there was at that time.

Q. On the 19th of January you think there was?

A. Yes, sir.

- Q. Are you certain of that?

A. I am not certain but I think so.

Q. Aren't you certain that they were not?

A. I couldn't say.

Q. The bridge had not been repaired yet, had it, Bridge 75A? A. I think it was.

Q. Are you certain?

A. No, I am not certain.

Q. Were you not out of gasoline in the town of Chitina?

A. We didn't have any gasoline in the blacksmith-shop—that [130—104] is where we always got it from.

Q. What kind of lights were you using in the town of Chitina?

A. Some use coal-oil and some use gasoline.

Q. Were they using gasoline then in the town?

A. I think so, I am not sure.

Mr. BORYER.—That is all.

(By Mr. RITCHIE.)

Q. When Mr. Forrester was around the tunnel there superintending the work where would he put in his time, did he have any particular place to stay or was he back and forth?

A. He would be out in the yard or inside the tunnel.

(Testimony of Henry Adler.)

Q. Do you know why he was able to learn sometimes of the approach of a train quicker than you could up there?     A. I guess he could.

Q. Why?

A. I guess he could find out in the depot.

Q. Did he sometimes go further toward the Copper River than you were working?

A. No, I don't think so—we didn't work in the other end of the tunnel then.

(By Mr. BORYER.)

Q. Trains were passing through there daily?

A. About three times a week, I think.

Q. You knew they were running trains through there?     A. Yes, sir.

Q. The smoke from these trains, sometimes it would be blacker than other smoke?

A. Yes, sometimes it would be pretty black and other times it would not be so bad.

Q. Do you know whether they were burning oil or coal at that [131—105] time?

A. I don't remember. I think it was coal.

Witness excused.

**[Testimony of Chris. H. Likits, for Plaintiff.]**

CHRIS H. LIKITS, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name?     A. Chris H. Likits.

Q. Where do you reside?     A. Kennecott.

Q. What are you doing now—at this time?

(Testimony of Chris. H. Likits.)

A. Carpenter.

Q. Where are you working? A. Kennecott.

Q. At the Kennecott Mines?

A. No, down below at the lower camp.

Q. For the Kennecott Mines Company?

A. Yes, sir.

Q. Where were you working in January, 1912?

A. In Chitina.

Q. At what were you working?

A. Framing timbers for the Chitina tunnel.

Q. Do you know the plaintiff in this case?

A. Yes, sir.

Q. Do you remember the circumstance of his being hurt by a fall in the Chitina tunnel, about the middle of January, 1912? [132—106]

A. Yes, sir.

Q. Were you around at the time he fell, close by?

A. Yes, sir.

Q. Tell the jury what you saw there.

A. Well, I was standing about seven or eight sets of timbers from the Chitina end, towards Kennecott, and the train had just passed and there was pretty much smoke in there, and I was waiting until the smoke cleared up and I heard something fall. I couldn't see then and I sat down and looked along the track. The smoke had raised from the track and I could see there was somebody on the track and I ran over and picked Heney up, and we carried him home.

Q. Did you see him as he fell or a moment afterwards?

(Testimony of Chris. H. Likits.)

A. No, I didn't see him fall but I heard him falling.

Q. How far away were you?

A. About seven or eight sets of timbers—the timbers are four feet apart.

Q. What were you doing at that time?

A. I was standing between the timbers, waiting for the smoke to get out.

Q. Was it pretty dark there?

A. Yes, it was pretty dark.

Q. Was it rendered more dark by the smoke?

A. Well, it was pretty dark; yes, sir.

Q. What time in the day was this?

A. I don't know what time of the day it was—it was in the afternoon some time.

Q. Was it still light outside?

A. Yes, sir, there was lots of light outside.

Q. Had it begun to get dark?

A. No, sir. [133—107]

Q. You say you heard Heney fall?

A. Yes, I heard him land on the ground.

Q. And you went up to him?

A. Yes, I heard the lantern he had in his hand—he kicked it down. I heard the glass jingle at the time.

Q. In what position did you find Heney?

A. He was lying on the right side, facing Chitina.

Q. Facing toward Chitina?      A. Yes, sir.

Q. Was he conscious?

A. He didn't say a word when I took him up. I said something about it but he never answered me.



(Testimony of Chris. H. Likits.)

Q. When did somebody else come to your assistance, how soon after that?

A. I don't know, I couldn't say how soon—it wasn't very long.

Q. Who was the first man that came?

A. I think the blacksmith just fetched a sharp saw into the tunnel, just happened to come into the tunnel at the time—he was filing saws for us and he was the first one to help me.

Q. And then all the men came from above?

A. Yes, sir.

Q. And what did you do with Heney then?

A. We carried him home.

Q. From where you picked him up?

A. Yes, sir.

Q. How long was it before he recovered consciousness?

A. Before we got out of the tunnel—we laid him down on the track and we took him about 50 ft., I guess. We were about in front of the tunnel, the portal, when we laid him down.

Q. Did he recover consciousness while he was lying there? [134—108] A. Yes.

Q. So he could talk?

A. He didn't talk, he just grunted—he was suffering with pain, I guess.

Q. Who carried him?

A. I was one and John Ard and then we changed off—I think Mr. Slimpet took hold afterwards.

Q. You went all the way to the house?

A. Yes, sir.

(Testimony of Chris. H. Likits.)

Mr. RITCHIE.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. What period of the afternoon was it?

A. About the middle of the afternoon, I guess.

Q. Were you using a light below?      A. No, sir.

Q. To work below?      A. No, sir.

Q. Was it necessary to use a light above?

A. Yes, they had been using lights all through the day above.

Q. Always used a light up above?      A. Yes, sir.

Q. Where was the train when you heard it?

A. I heard it whistling way down—I heard it whistling maybe two or three hundred yards before she came into the tunnel.

Q. Was she ringing her bell too?

A. She started to ring the bell before she entered the tunnel.

Q. You heard her whistle two or three hundred yards before she got to the tunnel?

A. Yes; if a man happens to be on the track he can hear her coming over the Copper River bridge.

[135—109]

Q. Now, then, you were further up toward the other end of the tunnel than Heney and Slimpet and Henry, were you not?

A. No; I guess I was about in the same place—that is where we were sending up timbers and lumber there, about the same place. I can't recall exactly where I was standing.

Q. Where were you standing when you heard the

(Testimony of Chris. H. Likits.)

whistle blow in relation to the place where Heney fell down?

A. Well, I was standing about the middle of the tunnel at the time I heard the whistle blow the first time, and there was a teamster there with a horse, and I sent him out and helped take the props off the car, and then I came back to the tunnel and then the train came in at the other end and I squeezed myself between the timbers and let the train pass by.

Q. Then you sent the teamster out with his team?

A. Yes, sir.

Q. How far did he have to go to get out?

A. About 200 yards, maybe.

Q. And then did you walk?

A. I walked back again to the tunnel.

Q. You went clear out with the teamster and came back to where they were working? A. Yes, sir.

Q. Do you recall if the trains were running from Cordova to Chitina at that time?

A. No, I don't know whether they were or not.

Q. Wasn't that the time that the road was tied up by reason of the accident down at the bridge 75A?

A. Yes, but I don't know whether they were through at the bridge or not—I don't remember whether they were through or not, but I don't think they were. [136—110]

Q. They were tied up there for about three or four weeks? A. Yes, sir.

Q. Do you recall what lights they were burning in Chitina at that time? A. In the Chitina town?

Q. Yes. A. Gasoline lights.

(Testimony of Chris. H. Likits.)

Q. Do you know if they were out of gasoline in the town?     A. No, I do not.

Q. Do you know whether or not they were out of coal oil in the town?     A. I don't know that either.

Q. Did you ever hear, or have any instructions there regarding your work when trains were passing through the tunnel?     A. Yes, sir.

Q. You say you did hear instructions?

A. Yes, sir.

Q. What was it?

A. Mr. Forrester told us, when Mr. Kilsen was there and was complaining of the smoke one day, Mr. Forrester said, if it gets too thick with smoke, to sit down and quit working or go downstairs.

Q. He told you to quit working?

A. Yes, he told us to quit working or go down—who wanted to stay up there, to stay up there and who wanted to go down, to go down.

By the COURT.—Was Mr. Heney there at that time?

A. I don't know.

Mr. RITCHIE.—We move to strike it out.

By the COURT.—It may stand. Of course it wouldn't be binding on Heney unless the jury find that Heney received such [137—111] instructions.

Q. Where were you at the time Mr. Forrester told you this?

A. I was right about in the middle of the tunnel, upstairs, at that time.

Q. Who else was working up there?

A. A man named John Locker and Bill Kilsen—

(Testimony of Chris. H. Likits.)

I heard somebody make the remark, call him Shorty.

(By Mr. RITCHIE.)

Q. Where were you standing when the train passed?

A. I was standing six or eight sets of timbers from the Chitina end, that is, on the new sets.

Q. Inside the tunnel? A. Yes, sir.

Q. Did you notice how many cars that engine was hauling? A. No, sir.

Q. Or whether they were loaded or not?

A. No, sir—I guess they had ore.

Q. They were ore cars? A. I think so.

Q. About how many cars do you think there were?

A. I don't know.

Witness excused. [138—112]

**[Testimony of J. W. Forrester, for Plaintiff.]**

J. W. FORRESTER, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. You reside at Chitina? A. Yes, sir.

Q. What position, if any, do you hold with the Copper River & Northwestern Railway Company at this time? A. Roadmaster, now.

Q. What position, if any, did you hold with the company in January, 1912?

A. Resident engineer.

Q. You have been familiar with the railroad up there for several years, have you not?

A. Yes, sir.



(Testimony of J. W. Forrester.)

Q. What is the grade coming up from the Copper River bridge to the Chitina tunnel?

A. It is  $2\frac{1}{2}\%$ , if I remember correctly, from the Chitina bridge to a point about six or seven hundred feet from the east portal of the Chitina tunnel.

Q. And then there is a very much less grade?

A. Yes, then it is one-half of one per cent.

Q. Do you remember the day Heney was hurt?

A. Yes, sir.

Q. About the 19th day of January, 1912?

A. Yes, sir.

Q. At that time was the Copper River & Northwestern Railway Co. doing a traffic business from Cordova to Chitina and beyond, along the Copper River?

A. No, sir, the road was tied up from Cordova to Chitina at that time.

Q. I mean was it engaged in business as a railroad carrier except [139—113] when it was stopped by accidents at that time?

A. They were running trains from Cordova to Chitina at that time.

Q. The Copper River & Northwestern Railway Co. was running trains, carrying freight and passengers, from Cordova to Kennecott, except when the road was blockaded?

A. Yes, sir, the railroad was.

Q. The railroad was carrying them?

A. Yes, sir.

Q. Some of these men that were doing work,—possibly all the work that was being done in the Chi-

(Testimony of J. W. Forrester.)

tina tunnel was done by the Katalla Company, was it not?     A. I don't know.

Q. Was the Katalla Company ever anything but a construction company for the Copper River & Northwestern Railway Co. and during the time of construction operating the railroad for the Copper River Company?

A. I know we received Katalla Company checks during construction—I don't know anything about the companies, though.

Q. You have seen the waybills that they used, have you not?     A. Yes, sir.

Q. I will ask you whether those are the ones that were used. (Handing witness paper.) That is the form they used?

A. That is the form of the waybill that they used to the best of my knowledge, yes, sir—I wouldn't be positive about it.

Mr. RITCHIE.—This is an exhibit in another case and I would like to read the printed heading of this into the record.

Mr. BORYER.—We object to it for the reason that this bill of lading is under date of March, 1911, and for the reason that it is possible that either the Katalla Company or the Copper River & Northwestern Railway Co. may have been doing [140—114] business in March, 1911, at the time this bill of lading is dated and may have gone out of business before the date of this accident.

Objection overruled. Defendant allowed an exception.

(Testimony of J. W. Forrester.)

Mr. RITCHIE.—I will read the printed heading of this—Katalla Company. (Constructing and operating Copper River & Northwestern Railway Co.) Straight bill of lading—Original. On the usual printed form.

Q. I will also ask you whether the Copper River & Northwestern Railway Company has been in continuous operation, except when blockaded by accidents, since it began operations, beyond Chitina, about the fall of 1910—that is, whether it has been carrying freight and passengers since some time in the fall of 1910, about that time, except when blockaded?

A. There has been trains running over the railroad carrying freight and passengers—I don't know what company it would be, though.

Q. Can you state whether or not when they ceased to use this bill of lading, Katalla Co., and adopted the present one—whether they continued to use this until they adopted the present form, Copper River & Northwestern Railway Co.?

A. I have no knowledge of that whatever, I couldn't testify.

Mr. RITCHIE.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. I will ask you if they are not still using this same bill of lading, the same form.

A. I couldn't say.

Mr. RITCHIE.—I will admit it, if you say they are using it.

(Testimony of J. W. Forrester.)

Q. Now, as a matter of fact, do you know anything in regard to [141—115] the business relations or connections between the Katalla Company and the Copper River & Northwestern Railway Co.?

A. I do not.

Q. You have never seen any of their contracts?

A. No, sir.

Q. Do you, as a matter of fact, know whether the Katalla Company is operating this road at the present time or not or if the Copper River & Northwestern Railway Co. is operating the road at this time?

A. I don't know; no, sir. I couldn't testify.

Q. You know there are trains running up and down this road? A. Yes, sir.

Q. You know that freight and passengers are being carried up and down this road?

A. Yes, sir.

Q. You don't know who has the license to operate this road? A. No, sir.

Q. I will ask you if you know that the articles of incorporation of the Katalla Company provide that it can do a common carrier business?

A. I don't know anything about it.

Q. I will ask you if you don't know or if you do know if the Copper River & Northwestern Railway Co. has a license to do a common carrier business over this particular line?

A. I don't know whether they have or not.

Q. I will ask you from whom you were drawing your checks at that time?

(Testimony of J. W. Forrester.)

A. The Katalla Company, to the best of my recollection—I couldn't say positively.

Q. On your direct examination Mr. Ritchie asked you what was [142—116] your position with the Copper River & Northwestern Railway Co. at that time, and you stated you were resident engineer—do you know if you were resident engineer for the Katalla Company or for the Copper River & Northwestern Railway Co. at the time?

A. I was resident engineer on the railroad; that is all I know about it.

Q. You don't know, as a matter of fact, whom you were working for? A. No, sir; I do not.

Q. Mr. Ritchie asked you whether the railroad company was doing a common carrier business and I believe you answered in the affirmative. I will ask you if you knew or if you know now whether it was the Katalla Company that was doing a common carrier business, or if it was the Copper River & Northwestern Railway Co. that was doing a common carrier business?

A. No, sir; I don't know which company it is.

Q. It wasn't your intention to tell the jury that you knew which one was, or if either was doing a common carrier business?

A. I know the railroad handles freight and passengers—I don't know which company it is.

Q. That freight is carried up on trains?

A. Yes, sir.

Q. But whether it is a company, corporation, individual or who it is, you don't know?



(Testimony of J. W. Forrester.)

A. No, sir.

Witness excused. [143—117]

**[Testimony of M. V. Lattin, for Plaintiff.]**

M. V. LATTIN, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name? A. M. V. Lattin.

Q. What position do you occupy?

A. Station agent.

Q. For what railroad company?

A. Copper River and Northwestern.

Q. You are now stationed at McCarthy or near there? A. Yes, sir.

Q. Were you formerly stationed at Chitina?

A. No, sir.

Q. Did you formerly work at Chitina?

A. No, sir.

Q. Where did you work before you went to McCarthy? A. Cordova.

Q. When were you working at Cordova?

A. A year and a half ago.

Q. Were you working in Cordova in January, 1912, and prior to that time?

A. I went to McCarthy as agent November 15, 1911, I believe it was.

Q. And you have been there ever since?

A. Yes, sir.

Q. And prior to that for a considerable time you were employed here?

(Testimony of M. V. Lattin.)

A. But not as agent here. I was in the train service and in the shops.

Q. Since you have been at McCarthy, you have sold tickets to passengers? [144—118]

A. Yes, sir.

Mr. BORYER.—When did you say you went to McCarthy?

A. November, I believe it was; 15th to 20th, 1911.

Q. You have been selling tickets to passengers at McCarthy ever since that, to passengers that traveled over the line? A. Yes, sir.

Q. How do those tickets read that you sell to passengers?

Mr. BORYER.—We object to that for the reason that it is not the best evidence.

By the COURT.—If he has any with him, he can use them; if he has not, he can give his best memory.

A. They have read the Katalla Company for, I believe, up to probably six months ago. I got a Northwestern ticket then.

Q. Prior to that time, didn't they have the words C. R. & N. W. on them? A. No, sir.

Q. Didn't have that at all on them? A. No, sir.

Q. The Katalla Company wasn't selling the ticket?

A. Yes, sir; we are selling, using the same thing yet, that is, in the half fare form.

Q. How did the waybills read up to a few months ago for freight, that is, the heading? I will ask you if that is the present form (handing witness paper).

A. This is the bill of lading.

(Testimony of M. V. Lattin.)

Q. Is that the present form in use?

A. We are using that at present.

Q. And prior to the time you began using that, did you have a form with the Katalla Company at the head of it?     A. Yes, sir. [145—119]

Q. It read, The Katalla Company, Constructing and Operating the Copper River & Northwestern Railway Company?     A. Yes, sir.

Mr. BORYER.—We move to strike the answer, and I want an exception, for the reason that the bill of lading says, Katalla Company Operating and Constructing the Copper River & Northwestern Railway Company; the fact that the Katalla Company was constructing does not show that there was any relation between the Katalla Co. and the Copper River & Northwestern Ry. Co., because the Katalla Company might have been an independent contractor.

Objection overruled and motion to strike denied.

Defendant allowed an exception.

Mr. RITCHIE.—That is all.

Mr. BORYER.—That is all.

Witness excused. [146—120]

[**Testimony of Thomas S. Scott, for Plaintiff.**]

THOMAS S. SCOTT, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name?     A. Thomas S. Scott.

Q. You are deputy clerk of the district court for the Third Division, Alaska?     A. Yes, sir.

(Testimony of Thomas S. Scott.)

Q. How long have you held that position?

A. Since May, 1909.

Q. Is the Clerk of the District Court the custodian of the papers required to be filed by foreign corporations doing business in Alaska?

A. For this division, yes, sir.

Q. Is the Clerk of the court for the Third Division the custodian of all the papers filed by foreign corporations doing business in this division?

A. Yes, sir.

Q. Among those corporations, is the Katalla Company one?      A. Yes, sir.

Q. State what those papers are (handing witness papers).

A. They seem to be numerous corporation papers of the Katalla Company, among which are original articles and yearly statements.

Q. Have you the articles there—a copy of the articles filed?

A. It is called certificate of incorporation; I presume that is the one.

Q. Get out the statements for 1911 and 1912.

Mr. RITCHIE.—Mr. Boryer, will you admit that the Katalla Company was incorporated for the purpose of constructing, incorporated under the laws of New York and doing business in Alaska as a construction company and for the constructing [147—121] of railroad and—

Mr. BORYER.—I admit that it was a construction company, organized for the purpose of constructing railroads.

(Testimony of Thomas S. Scott.)

Q. Have you found the statements for 1911 and 1912? A. Yes, sir, here they are.

Mr. RITCHIE.—I want to read into the record part of that paragraph (handing to Mr. Boryer). We plead that the Katalla Company is the agent of the Copper River & Northwestern Railway Co., doing certain work for it of which the public is not fully informed. I want to read what the company says about its own assets.

Mr. BORYER.—I have no objection to that.

Mr. RITCHIE.—This is the statement for 1911. The fifth paragraph recites that the assets of said corporation consist of contract for building a railroad in Alaska, material on hand and claim against R. R. Company for work already performed, which under the terms of contract is not yet payable. The fifth paragraph in the statement for 1912 reads: The assets of said corporation consist of contract for building a railroad in Alaska, material on hand, and claim against Railroad Co. for work already performed, which under the terms of contract is not yet payable.

Mr. BORYER.—We object to the introduction, for the reason that the statements as read from the papers do not show that these assets were assets of the Copper River & Northwestern Railway Co. and do not designate or say what assets it is or what railroad.

Mr. RITCHIE.—I think we will connect it up by other testimony.



(Testimony of Thomas S. Scott.)

By the COURT.—It may be admitted.

To which ruling of the Court counsel for defendant is allowed an exception. [148—122]

Q. As deputy clerk of the Court, do you know whether or not the Copper River & Northwestern Railway Co. is paying a license to operate a railroad as a common carrier from Cordova to Kennecott or thereabouts? A. It does.

Q. And how long has it been doing so?

A. Well, the first time it secured a license, it secured it for a certain number of miles, and my recollection is that they have increased the length of their road—they took out an additional license each time.

Q. How long has it had a license to operate beyond Chitina?

A. I couldn't tell you from memory.

Q. Has it been during the past two years?

A. I couldn't tell, I am sure.

Q. Do you know whether they have paid the license for at least two years?

A. They have paid a license for at least two years, I know.

Q. You don't know how far it extends?

A. I don't know; no.

Mr. RITCHIE.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. I will ask you to turn to the certificate of incorporation of the Katalla Company, on page 3, and ask you if this is the copy of the articles that was

(Testimony of Thomas S. Scott.)

introduced in evidence by the plaintiff.

A. The same copy.

Q. I will ask you if that is the articles of incorporation of the Katalla Company.

A. It is; yes, sir.

Q. I will ask you to read from page 3 the proviso found there. [149—123]

A. Provided, however, that nothing herein contained shall be construed as including in the business or purpose of the corporation the transaction of the business of banking or to constitute the corporation a railroad corporation or transportation corporation.

Q. Now, I will ask you if you have ever, if the clerk's office has ever issued a license to the Katalla Company to do a common carrier business?

A. My recollection is that all those licenses were issued to the Copper River & Northwestern Railway Co.

Q. And none to the Katalla Company?

A. Not that I remember.

Q. I will ask you if all of the licenses for the operation of this road have not been granted to the Copper River & Northwestern Railway Company.

A. To the best of my recollection they have; yes, sir.

Mr. BORYER.—That is all.

Witness excused.

Plaintiff rests.

Defendant files a motion for nonsuit on behalf of each of the defendants, which motion in each case is overruled and defendant is allowed an exception. [150—124]

*In the District Court of the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, and KATALLA COM-  
PANY,

Defendants.

**Motion [of Katalla Co.] for Nonsuit.**

Defendant, Katalla Company, by its attorney, R. J. Boryer, moves the Court for a motion for a nonsuit in this case for the following reasons:

I.

That this action is based on the Act of 1908, commonly known as the Employers' Liability Act, and the plaintiff has failed to establish that both defendants were doing a common carrier business. That in order for plaintiff to prevail in this action, having based his cause of action upon the aforesaid Act, it is necessary that he establish that both the Copper River & Northwestern Railway Company and Katalla Company were doing a common carrier business, for the reason that the aforesaid Act takes away the common-law liability and that they are separate and distinct laws which cannot be joined.

II.

That the plaintiff has failed to establish that he was employed by or working for the Katalla Com-

pany at the time he received his injuries.

III.

That the plaintiff has admitted that he was familiar with and knew the condition of the place where he stepped from and was injured. Has admitted that at the time he was injured the tunnel was full of smoke, the train had passed the point where he was standing [151] and he walked into the smoke ahead of him and that all of the other employees working with him stood still according to instructions given them by the foreman.

IV.

For the further reason that the plaintiff has failed to make out a case against this defendant.

R. J. BORYER,

Attorney for Katalla Company.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 6, 1913. Angus McBride, Clerk. By K. L. Monahan, Deputy.  
[152]

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*In the District Court of the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY and KATALLA COM-  
PANY,

Defendants.

**Motion [of Copper River & N. W. Ry. Co.] for  
Nonsuit.**

Defendant, Copper River & Northwestern Railway Company, by its attorney, R. J. Boryer, moves the Court for a nonsuit in this action for the following reasons:

I.

That this action is based on the Act of 1908, commonly known as the Employers' Liability Act, and the plaintiff has failed to establish that both defendants were doing a common carrier business. That in order for plaintiff to prevail in this action, having based his cause of action upon the aforesaid Act, it is necessary that he establish that both the Copper River & Northwestern Railway Company and Katalla Company were doing a common carrier business, for the reason that the aforesaid Act takes away the common-law liability and that they are separate and distinct laws which cannot be joined.

II.

That the plaintiff has failed to establish that he was employed by or working for the Copper River & Northwestern Railway Company at the time he received his injuries.

III.

That the plaintiff has admitted that he was familiar with and knew the condition of the place where he stepped from and was injured. Has admitted that at the time he was injured the tunnel was full of smoke, the train had passed the point where he was standing and he walked into the smoke ahead of him and that



all of the other [153] employees working with him stood still according to instructions given them by the foreman.

IV.

For the further reason that the plaintiff has failed to make out a case against this defendant.

R. J. BORYER,  
Attorney for Copper River & Northwestern Railway  
Company.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 6, 1913. Angus McBride, Clerk. By K. L. Monahan, Deputy.  
[154]

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Defense.

[Testimony of J. W. Forrester, for Defendant.]

J. W. FORRESTER, recalled as a witness in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. BORYER.)

Q. Where were you working in December, 1911, and January, 1912?

A. Around the Chitina tunnel, mostly.

Q. What general work were you doing there?

A. We were timbering a portion of the tunnel that had caved in.

Q. Was Mr. Heney there? A. Yes, sir.

Q. What work was he performing?

A. When he first went to work he run a shift—he had a night shift of laborers hauling out dirt from this cave-in and later I put him to work cutting

(Testimony of J. W. Forrester.)

lagging in the woods, and when that was finished he went to work inside putting up timbers and lagging, etc.

Q. Do you recall an accident there on the 19th of January?     A. Yes, sir.

Q. I will ask you if you also recall an accident that happened at Bridge 75A?     A. Yes, sir.

Q. That was on the first of January?

A. Yes, sir.

Q. I will ask you if the accident at bridge 75A did not tie the road up so that no trains were run from Cordova to Chitina until after this accident on the 19th day of January.     A. Yes, sir.

Q. I will ask you if you know what kind of light they were using in Chitina at that time and the supply of oil, etc.     [155—125]

A. They were very short of gasoline, I know—there was plenty of coal oil in town, though.

Q. Do you know if the company had run out of gasoline?     A. Yes, we had.

Q. Now, what instructions, if any, had you given the men working in this tunnel?

A. Why, I told them to come down out of the top of the tunnel when the trains came through and to work down below or work in the yard a few minutes until the smoke cleared away. I remember one time in particular that I walked out through the tunnel after the train had come through and it was very smoky and there was no work to do down below that day, and went up the ladder and asked the fellows why they didn't come down out of the smoke, and

(Testimony of J. W. Forrester.)

they said it was too cold—it was warm up above and the weather was 20° below and they would get wet, and they were all sitting down, waiting for the smoke to clear away, and I told them I remember numerous times, I have cautioned them, to keep still up there—if they didn't come down to stand still until the smoke cleared away. It was so dense a man couldn't see to work for a while at least after the train had gone through there.

Q. While you were working in that tunnel—can you hear the trains as they are approaching up the hill towards the tunnel?

A. If you are down on the track you can hear a train for a good distance, they make so much noise working up the hill—I don't know how far you could hear them above—you couldn't hear them so far.

Q. As a matter of fact, though, those trains would be heard as they come up the grade, when they get within 600 ft. of the tunnel? [156—126]

A. Yes, they slip all the way coming up the hill and make a good deal of noise.

Q. After the train gets up there and is going through the tunnel, do you think that any work can be performed there in the upper portion of the tunnel while the train is going through?

A. I don't believe a man could work up there for a few minutes after the train had gone through. I never saw anybody continue work there while the train was running through there—they always stopped and almost invariably came down until the smoke had cleared away. If they didn't come down,

(Testimony of J. W. Forrester.)

if it was too cold to come down, they always sat down or waited until the smoke did clear away.

Q. I will ask you if that was true when you had your large lights there.      A. Yes.

Q. You couldn't see to work then?

A. No,—the stack of the engine would come within probably four feet of this floor and it would belch the smoke right up through there and it came up in a very dense volume and the men couldn't see to work up there.

Q. Were you there the day of the accident to Heney?

A. I was there in the forenoon—I hadn't been in the tunnel since noon that day.

Q. You were under Mr. Wernicke, were you not?

A. Not at that time, no, sir.

Q. Was there some one over you concerning that tunnel?

A. Mr. Geiger was superintendent at that time.

Q. And you were under Mr. Geiger?

A. Yes, sir.

Q. Did you see the accident?    [157—127]

A. No, sir.

Q. Now, will you explain to the jury just how that floor was constructed and to what extent it was floored to the end of the tunnel, to the point where Heney fell off?

A. Well, this two-story timber work extended for a distance of 200 ft. and this opening where Heney fell off was at the Chitina end of this work; the other end was all closed. The floor was made out of 2 by

(Testimony of J. W. Forrester.)

12 or 3 by 12—I have forgotten which now—and they were cut so that they caught on the caps. The caps were 12 inches wide and the cross-section of the tunnel was 24 ft. wide, and this open place was about—it was narrower tunneling at the end where Heney fell down than it was the other end. I think it was probably 6 ft. wide at the corner where he fell and extended off in a triangular shape, probably 12 ft. wide at the other side. That was within about 20 ft. of the end of the tunnel, so when there was no trains coming through, the daylight shone right up through there, if it was very light—it would be like looking out of a window for instance to walk to the end of that timber—the track was below you and it was only 20 ft. to the daylight then and the light shone right in there, and there were three other hatches we used to haul timber up there.

Q. Explain what you mean by the opening there at that point.

A. Well, it is the opening where the tunnel started to cave in originally and there was some old timbers still standing there; there were four sets or five sets of old timbers still standing, right in the end of the tunnel; those were four feet apart—that would be 20 ft. from the outside of the tunnel into the open space where we started to erect the new timber. [158—128]

Q. In other words, that is the point that you start to retimber your tunnel in going back toward the Kennecott end? A. Yes, sir.

Q. And there was a space between that end and the



(Testimony of J. W. Forrester.)

other end toward Chitina of about 6 ft. on one side and about 12 ft. on the other?

A. I think it would be probably ten or twelve feet on the other side; yes, sir.

Mr. BORYER.—That is all.

Cross-examination.

(By Mr. RITCHIE.)

Q. You say that was near the entrance to the tunnel?

A. Yes, sir, this hole was about—well, probably it was 30 ft. from the daylight up to the timber, but to the nearest edge of the hole it would be about 20 ft.

Q. There is part of the timber structure, the timber of the tunnel, that extends out to the hole?

A. There is a shed that runs out through, yes, sir.

Q. That is pretty near solid?

A. It is now, yes, sir—it is all connected up with the tunnel timber.

Q. Wasn't it then?

A. No, sir, not at that time—at that time there was an opening probably about eight or ten feet wide.

Q. I mean this part of the tunnel which is outside of the hole, wasn't that part pretty closely closed up except for what cracks were in it?

A. No, sir, there was about eight or ten feet of a space open right over the top of that.

Q. How far was that from the entrance into the hole proper?

A. This hole led right up to the entrance to the hole. [159—129]

(Testimony of J. W. Forrester.)

Q. And how far is this hole Heney fell through from the edge of the hole as it now extends?

A. It would probably be about 30 ft.

Q. Do you think it is no more than that?

A. No, sir.

Q. Did you ever measure it?

A. Yes, there would be five sets in there; that would be 20 ft.—that would take you out to the portal of the tunnel and then I think on the outside, next to the set, is not more than ten or twelve feet—that would be 30 ft.

Q. What had this long gap across the tunnel been left for?

A. We pulled timber up there quite awhile and still had this portion to complete—that was the last work to be done on the tunnel.

Q. You expected to use it again?

A. Yes, to take up that shipment of timber.

Q. Did you ever put a rail there to guard that?

A. No, sir.

Q. And never hung a lantern on it? A. No, sir.

Q. That was January—it would get dark about 4 o'clock? A. Yes, sir; something like that.

Q. After that time it would be quite dark over that hole?

A. If there was no smoke in the hole, you could distinguish it very easily.

Q. Could you when it was completely dark outside?

A. I think so, yes—that was snow lying outside.

Q. You never had a light of any kind put up there

(Testimony of J. W. Forrester.)

to indicate its position?

A. No, only at the time that we were working right at that point—we had lights then. [160—130]

Q. Have you had much experience in tunnels?

A. I had some experience before I took that job—not very much.

Q. Is it not usually considered more safe to have a lantern, unless there is a railing, to have a lantern around any hole or shaft in a dark place?

A. My experience has been that men look out for themselves a great deal. Any holes that a man is liable to fall through like in the middle of a floor are generally covered.

Q. It is usual where the hole is in a dark place to either cover it or have a railing around it or have a light indicating its position?

A. For instance, the way we had the hatches there to raise the timber through, we had material there to cover them—those were generally in the middle of the floor where a man might walk into them.

Q. It would have been a very simple matter to put up a bar, something like a scantling, across the side of that—on the side where the men were working?

A. Yes, sir, you could wall it.

Q. It could have been very easily done?

A. Yes, sir.

Q. And you could have hung a small lantern there to indicate the edge of the hole? A. Yes, sir.

Q. That would have been taking a precaution which a man might well think of?

A. It would have been a precaution, yes, sir.

(Testimony of J. W. Forrester.)

Q. The trains could have been run around over the hill instead of through the tunnel while the men were working there?

A. They were for a long time, until the tunnel was opened.

Q. Wouldn't it have been safer for the work there if the trains [161—131] had been run over the hill until the tunnel was completed?

A. I don't think so.

Q. There was a good deal of time lost by running the trains through the tunnel by men having to quit there on account of the smoke?     A. Very little.

Q. Did you have any positive orders that the men were to come down if the smoke was bad?

A. I told them during the time we were lagging the timbers, while there was work to do in the yard, they always came down, but afterwards they stayed there, of their own free will; they could have come down if they wanted to.

Q. You were never up there to know when the train comes in whether the sound is deadened?

A. Yes, sir, I have been up there. I don't think you could hear a train so far up there but you can always hear the train whistle.

Q. Do trains always whistle coming up the hill?

A. Yes, sir, twice.

Q. You don't know whether the men always carry out the instructions?

A. All the time I worked there I was pretty careful about that.

By Juror PEDERSEN.—Is this tunnel straight or

(Testimony of J. W. Forrester.)

has it some curves?

A. There is a curve in the Kennecott end of the tunnel.

Q. In the end where he was working?

A. No, it was the other end, the far end.

Q. The curve doesn't start until you get out of the portal?

A. The curve extends into the portal a short distance, a few feet.

Q. It doesn't curve much until you get out in the open cut? [162—132] A. No, sir.

Mr. RITCHIE.—That is all.

Witness excused.

Testimony closed. [163—133]

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*In the District Court for the Territory of Alaska,  
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY CO., a Corporation, and THE KA-  
TALLA COMPANY, a Corporation.

Defendants.

**Trial [Continued].**

Now, on this day, the trial of the above-entitled cause came on again regularly for trial; E. E. Ritchie appearing as attorney for the plaintiff; R. J. Boryer appearing as attorney for the defendants. Came the



jury, heretofore impaneled and sworn herein, and being called and each answering to his name and the defendants having rested on a prior day of this trial, and the plaintiff offering no testimony in rebuttal,

THEREUPON, defendants filed their separate motions for a directed verdict, which said motions were by the Court denied, to which order and ruling of the Court defendants except and exception is duly allowed.

WHEREUPON arguments were had by counsel for plaintiff and counsel for defendants, the jury was duly instructed as to the law in the premises, and retire in charge of their sworn bailiffs for deliberation.

Special April, 1913, Term—May '7th, 1913—24th Court Day.

Entered Court Journal No. C.-2, page No. 89.  
[164]

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*In the District Court of the Territory of Alaska,  
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY and KATALLA COM-  
PANY,

Defendants.

**Motion [of Copper River & N. W. Ry. Co.] for  
Directed Verdict.**

Defendant, Copper River & Northwestern Railway Company, by its attorney, R. J. Boryer, moves the Court for a Directed Verdict for the following reasons:

I.

That this action is based on the Act of 1908, commonly known as the Employers' Liability Act, and the plaintiff has failed to establish that both defendants were doing a common carrier business. That in order for plaintiff to prevail in this action, having based his cause of action upon the aforesaid act, it is necessary that he establish that both the Copper River & Northwestern Railway Company and Katalla Company were doing a common carrier business, for the reason that the aforesaid Act takes away the common-law liability and that they are separate and distinct laws which cannot be joined.

II.

That the plaintiff has failed to establish that he was employed by or working for the Copper River & Northwestern Railway Company at the time he received his injuries.

III.

That the plaintiff has admitted that he was familiar with and knew the condition of the place where he stepped from and was injured. Has admitted that at the time he was injured the tunnel was full of smoke, the train had passed the point where he was standing and he walked into the smoke

ahead of him and that all of the [165] other employees working with him stood still according to instructions given them by the foreman.

IV.

For the further reason that the plaintiff has failed to establish a case against this defendant.

R. J. BORYER,  
Attorney for Copper River & Northwestern Railway  
Company.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 7, 1913. Angus McBride, Clerk. By K. L. Monahan, Deputy. [166]

*In the District Court of the Territory of Alaska;  
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, and KATALLA COM-  
PANY,

Defendants.

**Motion [of Katalla Co.] for Directed Verdict.**

Defendant, Katalla Company, by its attorney, R. J. Boryer, moves the Court for a Directed Verdict for the following reasons:

I.

That this action is based on the Act of 1908, commonly known as the Employers' Liability Act, and the plaintiff has failed to establish that both defend-

ants were doing a common carrier business. That in order for plaintiff to prevail in this action, having based his cause of action upon the aforesaid Act, it is necessary that he establish that both the Copper River & Northwestern Railway Company and Katalla Company were doing a common carrier business, for the reason that the aforesaid Act takes away the common-law liability and that they are separate and distinct laws which cannot be joined.

## II.

That the plaintiff has failed to establish that he was employed by or working for the Katalla Company at the time he received his injuries.

## III.

That the plaintiff has admitted that he was familiar with and knew the condition of the place where he stepped from and was injured. Has admitted that at the time he was injured the tunnel was full of smoke, the train had passed the point where he was standing and he walked into the smoke ahead of him and that all of the other [167] employees working with him stood still according to instructions given them by the foreman.

## IV.

For the further reason that the plaintiff has failed to make out a case against this defendant.

R. J. BORYER,

Attorney for Katalla Company.

[Endorsed:] Filed in the District Court, Territory of Alaska, Third Division. May 7, 1913. Angus McBride, Clerk. By K. L. Monahan, Deputy. [168]

Whereupon Mr. Boryer renewed his motion for a nonsuit on behalf of each of the defendants and also filed a separate motion on behalf of each of the defendants for a directed verdict, which motion in each case was by the Court overruled and defendant allowed an exception.

Counsel then addressed the jury, after which the Court delivered his instructions as follows:

**Instructions of the Court.**

**GENTLEMEN OF THE JURY:**

This is an action for damages alleged to have been suffered by the plaintiff, Heney, by reason of the negligence of the defendant corporations, in the manner set out in the complaint herein, to which you are referred for a more particular description of the same.

The defendant corporations deny the allegations of the complaint except that they admit they are duly incorporated. And each defendant corporation alleges that if any injury occurred to the plaintiff as alleged in the complaint, it was by reason—

1st. Of risks incident to his employment in which he was engaged and which risks the plaintiff assumed.

2nd. Of the negligence or contributory negligence of the plaintiff [169—133] and by reason of the negligence of a fellow-servant.

Therefore, under the issues and evidence in this case it becomes incumbent upon you as jurors to decide under these instructions and the facts as you find them the cause of the injury, if any, to the plaintiff, and whether one or both, or if either of the defendants are responsible for the same in whole



or in part, or at all.

I will first proceed to give you the law applicable to the case, in the absence of special statutory provisions, which apply only to railroads as common carriers in Alaska and later give you the law as it exists on the same subject matter, when a defendant employer is a railroad common carrier, and an employee is injured while engaged as a servant in the service of such common carrier.

You are instructed that the rule of law is that between master and servant the master is liable for all accidents occurring in the course of the employment which are not induced by the carelessness or improper conduct of the employee or servant.

In other words, the master is bound to use reasonable care and diligence to prevent accident or injury, and if he does not, he will be responsible for the damages, unless the servant assumed the risk or contributed to the injury through his own negligence, or the negligence of a fellow-servant.

The master is not an insurer of the servant, but he is required to exercise such ordinary and reasonable care and precaution for the safety of his servants as the nature and dangers of the business admit of and demand. [170—134]

As between master and servant, negligence should be measured by the character and risk of the business engaged in and the degree of care of both master and servant is higher when the lives and limbs are endangered than in ordinary cases.

All acts and duties which the master is bound to perform toward his employees or servants, which he

delegates the performance of to others as an agent, then the agent occupies the same place as the master, and the master is deemed present and liable for the manner in which such duties are performed.

Negligence is not to be imputed to a master merely by reason of the fact that the place in which his servants are working is dangerous, or of a peculiarly dangerous character, but when an employee is required to render services in such a dangerous place, it is the duty of the master to make reasonable provision to protect him from the dangers to which he is exposed while engaged in the discharge of his duties.

So when a servant is employed in a tunnel, the master owes him the duty to use ordinary and reasonable care and diligence to make his place of work as reasonably safe as the nature of the work admits of.

Where it is the duty of the workmen in a tunnel to shore up or crib or otherwise make safe the place of work as the work progresses, the master's duty is fulfilled when he furnishes them with suitable materials for the purpose and the above last-mentioned rule does not apply unless the master has some one in charge directing the work, and the employees are following the direct commands and directions of the master or his agent, in the due course of their duties as master. [171—135]

To hold a master liable for injuries alleged to have been suffered by or caused by the unsafe methods of work adopted by the master, it must be shown that he had or ought to have had knowledge of the danger.

To hold the master responsible for the method of work employed it must be shown that it was the

proximate cause of the injury.

### ASSUMED RISKS.

You are instructed that the servant does not assume the extraordinary or unusual risks of the employment but on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knew or may have known in the exercise of reasonable care, except that he does not assume such risks as are created by the master's negligence.

### CONTRIBUTORY NEGLIGENCE.

Where the negligence or want of ordinary care and caution of a servant so far contributes to his injury that it would not have occurred but for such negligence, he cannot as a rule recover. But if the injury is caused by the gross or wilful negligence of the master or his agents, or if the consequences of the servant's negligence might have been avoided by the exercise of ordinary and reasonable care on the part of the master or his agents, then the servant could recover though himself negligent.

### FELLOW-SERVANT, CONTRIBUTORY NEGLIGENCE OF.

All servants engaged in the same common work, without any dependence upon or relation to each other, except as colaborers [172—136] without rank, under the direction and management of the master or his agents, are fellow-servants.

A master is not responsible in damages for injuries to a servant caused by the negligence of a fellow-servant, engaged in the same general business,

where the master has furnished proper means for carrying on the work in which they are engaged.

To render the master not liable for an injury to a servant caused by the negligence of a fellow-servant, it must be shown that the injury directly resulted by reason of such fellow-servant's negligence, that is, that it was the proximate cause thereof and not the negligence of the master.

You are instructed that if you find from the evidence that the plaintiff was engaged in making the framework of the tunnel along with his coworkers and that he knew that the end of the tunnel where he fell had no guard-rail, then you are instructed that the plaintiff was bound to use such extraordinary care and caution as the known dangers of the place required.

You are instructed that if you find in this case that the plaintiff was working as a carpenter at the time of the injury and that he was familiar with and knew that the place where he fell over had no guard-rail, which fact was known a few days previously, and you further find he continued working there with knowledge of these facts, and if you further find that he knew or ought to have known, as a reasonably prudent man in his place, that it was dangerous so to do, with no guard-rail there, and you further find no one in authority had promised to erect one at the place, or other protection for this particular place, then you are instructed the plaintiff would assume the natural [173—137] and ordinary risks incident to the absence of the said guard-rails at the place and would be guilty of contributory negligence.



The Act of Congress mentioned in these instructions provides in part:

“That every common carrier engaged in commerce in the Territories \* \* \* shall be liable in damages to any person suffering injury while he is so employed by such carrier in any of said Territories, for such injury \* \* \* resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.”

“That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act, to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.”

You are instructed that a railroad common carrier in Alaska who as master employs a servant and the latter is injured while in such employment and the facts develop that both, that is, the master and servant, were negligent and such negligence caused the servant's injury, then the servant may still recover damages against the Railroad Company, but the damages should be in proportion to the negligence of the servant's contributing to his [174—138] injury, that is, the Railroad should answer in damages in proportion to the amount of negligence it contributed



to the cause of the injury to the employee or servant.

You are instructed that the plaintiff has sued both defendants, the Copper River & Northwestern Railway Company and the Katalla Company, and alleges that he was in the employment of both. Therefore you are instructed that before you can find that the plaintiff was in such employment you must find from the evidence that the relation of master and servant existed between the plaintiff and the defendant companies at the time of the injury.

You are also instructed that before you can find either of the defendants a common carrier under the statutory provisions of Congress referred to as the Acts of 1906 and 1908 you must be convinced by the evidence that one or both was offering or holding itself or themselves out to carry goods and passengers for the general public when offered and tendered them and the price for so doing.

In this case the burden of proving the issues alleged in the complaint and not admitted by the defendants devolves upon the plaintiff.

So the affirmative issues set up in the defendants' answers and denied by the plaintiff's reply must be proved by a preponderance of the evidence by the defendants or either of them, to entitle them to a verdict by reason of such defenses.

What we mean by a preponderance of the evidence is, that [175—139] preponderance refers to something that may and should be weighed. Of course you cannot get a pair of scales and weigh on one side the plaintiff's testimony, that of his witnesses, the presumptions, facts and circumstances in his favor

and that of the defendants on the other side of the scales, but you are to try to do so mentally so far as possible.

When the affirmative of an issue is sustained by the preponderance of the evidence, that means that the weight of the testimony on whose side the burden of proof rests has the greater weight and is therefore entitled to the verdict. While if the weight of the testimony is evenly balanced or preponderates in favor of the side on which the burden of the proof does not rest, then the verdict must be for the latter.

In determining the issues in this case you should take into consideration the whole of the evidence, and all the facts and circumstances proved on the trial, giving to the several parts of the evidence such weight as you think they are entitled to, and in determining the weight to be given to the testimony of the several witnesses, you should take into consideration their interest in the result of the suit, if any such is proved, their conduct and demeanor while testifying, their apparent fairness or bias, if any appears, their appearance on the witness stand, the reasonableness of the story told and statements made by them and all the evidence and circumstances tending to corroborate or contradict such witnesses, if any such are proved.

You cannot resort to conjecture and possibilities, but you must consider only those injuries, if any, that the plaintiff, by a preponderance of the evidence, has shown to exist. [176—140]

You are instructed the elements of damages to be considered in a suit for personal injuries when recoverable under the law and facts are the bodily

pain and suffering and mental anguish, if any, endured by him and resulting from the injuries, if any, received; the character and extent of the injuries as alleged in the complaint and sustained, if any, by the evidence, and whether they are permanent in their nature; the extent, if any, to which he has been prevented and disabled by reason of such injuries from working and earning a livelihood for himself in his station of life; his necessary expenses for medical attention, if any, in endeavoring to be cured.

These are what is known as compensatory damages.

This is your last case at this term of court, of which you have had several on the same general subject of personal injuries.

Give the evidence and the law your careful consideration and confine your deliberations thereto.

Three forms of verdict will be submitted. When you shall have unanimously agreed upon one, sign it by the hand of your foreman and return it into court. [177—141]

**[Certificate of Official Stenographer to Transcript of Evidence.]**

I do hereby certify that I am the official court stenographer for the Third Judicial Division, Territory of Alaska; that as such official stenographer I reported the proceedings in the trial of James Heney vs. Copper River & Northwestern Ry. Co. and Katalla Company; that the above is a full, true and correct transcript of the shorthand notes taken by me of the evidence given at said trial.

I. HAMBERGER,

Valdez, Alaska, May 31, 1913. [178]

*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and  
KATALLA COMPANY, a Corporation,  
Defendants.

**Court's Certificate to Bill of Exceptions.**

I, Fred M. Brown, Judge of the above-entitled court, do hereby certify that the above and foregoing Bill of Exceptions in the above-entitled cause is a true bill of exceptions and the same has been and is approved, allowed and settled and ordered filed and made a part of the record of said cause.

Done in open court this the 25 day of June A. D.  
1913.

FRED M. BROWN,  
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. Entered Court Journal No. 7, page No. 281. [179]

*In the District Court for the Territory of Alaska,  
Third Division.*

Special April, 1913, Term—May 8th—25 Court Day  
—Thursday.

Entered Court Journal No. C.—2, Page No. 92.

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY CO., a Corporation, and KATALLA  
CO., a Corp.,

Defendants.

**Trial [Continued].**

Now, on this day, the trial of the above-entitled cause came on again regularly for trial. Came the jury heretofore impaneled and sworn herein in charge of their sworn bailiffs and being called and each answering to his name present, by and thru their foreman in their presence in open court, their verdict, which is in words and figures as follows, to wit: [180]



*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

THE COPPER RIVER & NORTHWESTERN  
RY. CO., a Corp., and THE KATALLA  
COMPANY, a Corporation,

Defendants.

**Verdict.**

We, the jury duly selected, impaneled, sworn and charged in the above-entitled action, do find for the plaintiff and against the defendants, and each of them, and assess plaintiff's damages at \$2,125.00.

Dated at Cordova, Alaska, this 8th day of May, A. D. 1913.

KARL LONG,

Foreman.

[Endorsed]: Filed in the District Court, Territory, of Alaska, Third Division. May 8, 1913, Angus McBride, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. C.—2, page No. 92.  
[181]

WHEREUPON said verdict is ordered filed and entered by the Clerk, and the jury is excused from further deliberation herein. [182]

*In the District Court of the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and  
KATALLA COMPANY, a Corporation,  
Defendants.

**Instructions [Requested by Defendant].**

Comes now the Copper River and Northwestern Railway Company and the Katalla Company and requests the Court to make the following instructions in the above case:

I.

You are instructed that if you find from the evidence that the plaintiff was engaged in making the framework of the tunnel along with his coworkers, and that he knew that the end of the tunnel where he fell had no guard-rail, then you are instructed that the plaintiff was bound to use such extraordinary care and caution as the known dangers of the place required.

II.

You are instructed that the defendants, Copper River & Northwestern Railway Company and the Katalla Company, have plead separately in this action, and in order for you to find a verdict against either of the defendants, 'Copper River & Northwest-

ern Railway Company and the Katalla Company, you *much* first find from the evidence that the plaintiff was working for either the Katalla Company or the Copper River & Northwestern Railway Company or both, and if the evidence fails to show that the plaintiff was working for the Katalla Company, then you are instructed that the plaintiff cannot recover against the Katalla Company, and you are further [183] instructed that if the plaintiff fails to show from the evidence that he was working for the Copper River & Northwestern Railway Company, then you are instructed that he cannot recover against the Copper River & Northwestern Railway Company.

## III.

You are instructed that if you find from the evidence that the plaintiff had been warned that when trains were passing through the tunnel that he should quit work and either come down from the roof of the tunnel or not move around, and he failed or refused to obey said orders, and he would not have been injured if he had obeyed said orders, and he was injured by refusing to obey said order, then you are instructed that the plaintiff cannot recover in this action.

## IV.

You are instructed that the burden is upon the plaintiff to establish his cause of action by a preponderance of evidence, and that the plaintiff cannot recover unless he proves by preponderance of the evidence not only that the defendant was negligent but also that the defendant's negligence was the cause of the injury to the plaintiff, and if he fails to establish

these facts by the preponderance of the evidence the plaintiff cannot recover.

## V.

You are instructed that the plaintiff is presumed to know the dangers that he has an opportunity to observe and that he must inform himself of open, obvious risks, and if he does not do this and is injured by reason of his failure to do so, then he cannot recover.

## VI.

You are instructed that the law requires a person when doing a dangerous piece of work to exercise such care for his safety as an ordinary prudent man would exercise under the circumstances, and unless he exercises such care and is injured by reason of not having exercised such care he cannot recover. [184]

## VII.

You are instructed that if the plaintiff had actual or constructive knowledge of danger of working at the point where the accident happened, and that a reasonably prudent man under the circumstances would exercise due care to avoid danger, and the plaintiff was injured by reason of his failure to use ordinary care, he is guilty of contributory negligence and cannot recover.

## VIII.

You are instructed that if the plaintiff continued working with knowledge, actual or constructive, of dangers which an ordinary prudent man would refuse or subject himself to, he is guilty of contributory negligence and cannot recover.

## IX.

You are instructed that if the plaintiff failed to exercise ordinary and reasonable care, which care is such as an ordinary prudent man would exercise under similar circumstances, he is guilty of contributory negligence and cannot recover.

## X.

You are instructed that the plaintiff has sued both the Katalla Company and the Copper River & Northwestern Railway Company, alleging that each of them are separate corporations and that the plaintiff was in the employ of both Katalla Company and the Copper River & Northwestern Railway Company, therefore you are instructed that before you can find that the plaintiff was in the employ of both the Katalla Company and the Copper River & Northwestern Railway Company, you must find from the evidence that the relation of master and servant existed between the plaintiff and the Katalla Company and the Copper River & Northwestern Railway Company at the time of the injury, and if you find that the relation of master and servant did not exist between the plaintiff and Katalla Company at the time of injury, then the plaintiff cannot recover against the Katalla Company, and if you find the relation of master and servant did not [185] exist between the Copper River & Northwestern Railway Company at the time the injury happened to plaintiff, then he cannot recover against the Copper River & Northwestern Railway Company.

## XI.

You are instructed that if you find that the Katalla



Company was not doing a common carrier business at the time that the plaintiff was injured, and doing a common carrier business over that portion of the railroad line upon which the plaintiff was working and at the place where he was injured, you are instructed that the plaintiff cannot recover in this action.

## XII.

You are instructed that before you can find that the Copper River & Northwestern Railway Company was a common carrier at the place of the injury to the plaintiff, the plaintiff must prove that the Copper River & Northwestern Railway Company was offering or holding itself out to carry goods for all persons who tendered or offered goods and the price of carriage, and also find from the evidence that the Copper River & Northwestern Railway Company was carrying goods for all persons who offered or tendered them and the price of carrying them through the tunnel where the plaintiff was injured.

## XIII.

You are instructed that plaintiff has admitted in this case that he was working as a carpenter at the time of his injury and that he was familiar with and knew that at the place where he fell over had no guard-rail across it, which fact was known to him for several days prior to the accident and at the time of the accident; therefore you are instructed that if the plaintiff continued working with knowledge of these facts as he has testified that he did have, and if you further find that he knew or ought to have known as a reasonable prudent man that it was dangerous not

to have a guard-rail at this place, and no one in authority had promised to have a guard-rail or other protection at this place, then you are instructed the plaintiff assumed the [186] risks incident to no guard-rail being at the point or place where he fell.

#### XIV.

You are instructed that plaintiff has admitted in this case that he was working as a carpenter at the time of his injury, and that he was familiar with and knew that at the place where he fell over had no guard-rail across it, which fact was known to him for several days prior to the accident and at the time of the accident; therefore you are instructed that if the plaintiff continued working with knowledge of these facts as he has testified that he did have, and if you further find that he knew, or ought to have known as a reasonable prudent man, that it was dangerous not to have a guard-rail at this place and no one in authority had promised to have a guard-rail or other protection at this place, then you are instructed that the plaintiff assumed the risks incident to no guard-rail being at the point where he fell and cannot recover in this case.

#### XV.

You are instructed that plaintiff has admitted in this case that he was working as a carpenter at the time of his injury and that he was familiar with and knew that at the place where he fell over had no guard-rail across it, which fact was known to him for several days prior to the accident and at the time of the accident; therefore you are instructed that if the plaintiff continued working with knowledge of these

facts as he has testified that he did have, and if you further find that he knew or ought to have known as a reasonable prudent man that it was dangerous not to have a guard-rail at this place, and no one in authority had promised to have a guard-rail or other protection at this place, then you are instructed that the plaintiff assumed the risks incident to no guard-rail being at the point or place where he fell and is guilty of contributory negligence. [187]

## XVI.

You are instructed that the plaintiff has admitted that he knew at the time of his accident and for several days prior thereto that there was no guard-rail or other protection at the point or place where he fell and has admitted that he knew that trains were running through this tunnel and that smoke from the engines surrounded the place where he was working, and that while he was surrounded by smoke from the engine he voluntarily continued working when he knew that he could not see where he was walking and that he did proceed, and while walking stepped off of the point or place where he claims there was no guard-rail, therefore you are instructed that the plaintiff assumed the risks of walking or trying to work at that time.

## XVII.

You are instructed that the plaintiff has admitted that he knew at the time of his accident and for several days prior thereto that there was no guard-rail or other protection at the point or place where he fell, and has admitted that he knew that trains were running through this tunnel and that smoke from the

engines surrounded the place where he was working, and that while he was surrounded by smoke from the engine he voluntarily continued working when he knew that he could not see where he was walking, and that he did proceed and while walking stepped off of the point or place where he claims there was no guard-rail, therefore you are instructed that the plaintiff assumed the risks of walking or trying to work at that time, and he is guilty of contributory negligence.

### XVIII.

You are instructed that the plaintiff has admitted that he knew at the time of his accident and for several days prior thereto that there was no guard-rail or other protection at the point or place where he fell, and has admitted that he knew that trains were running through [188] this tunnel and that smoke from the engines surrounded the place where he was working, and that while he was surrounded by smoke from the engines he voluntarily continued working when he knew that he could not see where he was walking, and that he did proceed and while walking stepped off of the point or place where he claims there was no guard rail, therefore you are instructed that the plaintiff assumed the risks of walking or trying to work at that time, and he cannot recover in this case.

### XIX.

You are instructed that the plaintiff admitted that he was working while he claims the tunnel or place of work was not sufficiently lighted for several days. You are instructed that if the plaintiff knew this and



continued at work, that the plaintiff assumed the risks incident to his employment by reason of the fact that the tunnel was not sufficiently lighted.

## XX.

You are instructed that the plaintiff admitted that his general work was that of assisting in re-timbering and strengthening the tunnel for the purpose of making same safe, you are therefore instructed that the plaintiff assumed all of the risks of his employment in his work of retimbering and strengthening said tunnel.

## XXI.

You are instructed that this case is based upon the Acts of 1906 and 1908 regarding common carriers. You are instructed that before the plaintiff can recover in this case he must prove by the preponderance of evidence that both of the defendants were common carriers, and unless you so find the plaintiff cannot recover in this action.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 7, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [189]



*In the District Court of the Territory of Alaska,  
Third Division.*

C.—No. 49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and  
KATALLA COMPANY, a Corporation,  
Defendants.

**Motion for New Trial.**

Comes now the defendants, Copper River & Northwestern Railway Company and Katalla Company, and moves the Court for a new trial in this action for the following reasons:

I.

That the damages allowed by the jury were excessive and were given under influence of passion and prejudice.

II.

That there was insufficiency of evidence to justify the verdict and that the same is against the law.

III.

Error in law occurring at the trial and excepted to by the party making the application.

IV.

For the reason that the plaintiff based this action on the Acts of 1906, 1908 and 1910, commonly known as the Employers' Liability Act regarding common carriers, that there was no evidence introduced in

this case sufficient for the jury to find that both the Copper River & Northwestern Railway Company and the Katalla Company were each or both doing a common carrier business, and that the verdict in this case was rendered against both the Copper River & Northwestern Railway and the Katalla Company, and that the evidence failed to show that either of said defendants were connected in any way with each other in doing a common carrier or other business. [190]

#### V.

For the further reason that the Court instructed the jury both under the common-law liability and the liability under the Acts of 1906, 1908 and 1910, commonly known as the Employers' Liability Act regarding common carriers; that the two remedies are separate and distinct, and that the plaintiff suing under the aforesaid Acts cannot recover under the common-law liability.

#### VI.

For the further reason that the plaintiff admitted that he was working for the Katalla Company on a platform that was without a guard-rail; that he knew at the time and for several days prior thereto that said platform did not have a guard-rail on it, and knew the exact position and condition of the point or place where he claims he was injured and by which *he injured*; that the evidence further showed that he with three other coworkers working with him, no foreman being present, were performing work on the scaffold or platform, and that the plaintiff himself had at prior times, when trains were

passing through the tunnel, gone down from this platform in order to avoid smoke from the trains, and on this particular day and time this plaintiff, knowing that the tunnel was full of smoke, claims to have started from the place where he was standing to walk toward the end of the tunnel where he was injured for the purpose of putting down some braces; that the plaintiff admitted that the smoke was so thick that he was unable to see the floor and that he was walking to this point to put some braces on the floor; that all of the other men working with him admitted that they stood still at this time, they also admitted that they could not see and had received instructions before that when trains passed through the tunnel and the smoke ascended that they should remain still; that the plaintiff knowing the condition of the tunnel and knowing that it was impossible for him to perform the work which he claims he started to do, attempted to walk through the smoke and walked off the point or place where he claims there was no guard-rail, although he admits that he knew there was no guard-rail at this point at that time and for several days prior thereto, and admits that there [191] was sufficient lumber convenient which he could have used to put on a guard-rail.

R. J. BORYER,  
Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 10, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.  
[191“A”]

198 *Copper River & Northwestern Ry. Co. et al.*

*In the District Court for the Territory of Alaska,  
Third Division.*

Special April, 1913, Term—May 10th—26th Court  
Day—Saturday.

Entered Court Journal No. C.—2, Page No. 100.  
C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corp., and THE KA-  
TALLA COMPANY, a Corp.,

Defendants.

**Order Denying Motion for New Trial, Granting  
Exception and Fixing Time to File and Present  
Bill of Exceptions.**

Now, on this day, this matter came on regularly to be heard upon the motion for a new trial filed by the defendants herein, E. E. Ritchie appearing as attorney for the plaintiff, R. J. Boryer appearing as attorney for defendants, and after arguments had and the Court being fully advised in the premises,

IT IS ORDERED that said motion for a new trial filed by the defendant herein be and the same is hereby denied, to which order and ruling of the Court defendant excepts and exception is duly allowed; and

IT IS FURTHER ORDERED that defendants have 60 days from date hereof to file and present their bill of exceptions and that execution be stayed for said period. [192]

*In the District Court of the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and  
KATALLA COMPANY, a Corporation,  
Defendants.

**Defendants' Exceptions to the Court's Instructions  
to Jury.**

I.

Defendants except to Instruction 1 given by the Court on page 2, which is as follows: "I will first proceed to give you the law applicable to the case, in the absence of special statutory provisions which apply only to railroads as common carriers in Alaska, and later give you the law as it exists on the same subject matter, when a defendant employer is a railroad common carrier, and an employee is injured while engaged as a servant in the service of such common carrier," for the reason that in this instruction the Court states that he is instructing first under the statutory law regarding common carriers and, secondly, under the common law regarding carriers.

II.

*Defendant* excepts to instruction 2 on page 2, which is as follows: "You are instructed that the rule of law is that between master and servant the



master is liable for all accidents occurring in the course of the employment which are not induced by the carelessness or improper conduct of the employee or servant," for the reason that said instruction is contrary to the law and confusing as to whether said instruction was meant to apply to liability of common carriers under the statutory law or common law. [193]

## III.

*Defendant* excepts to the third instruction on page 2, which is as follows: "In other words, the master is bound to use reasonable care and diligence to prevent accident or injury and if he does not he will be responsible for the damages, unless the servant assumed the risk or contributed to the injury through his own negligence, or the negligence of a fellow-servant," for the reason that the same is contrary to law and the issues raised in this case.

## IV.

*Defendant* excepts to fourth instruction given on page 2, which is as follows: "As between master and servant negligence should be measured by the character and risk of the business engaged in and the degree of care of both master and servant is higher when the lives and limbs are endangered than in ordinary cases," for the reason that the same is contrary to law and is not applicable to the issues in the pleadings.

## V.

*Defendant* excepts to the first instruction on page 3, which is as follows: "All acts and duties which the master is bound to perform toward his employees or

servants, which he delegates the performance of to others as an agent, then the agent occupies the same place as the master and the master is deemed present and liable for the manner in which such duties are performed," for the reason that said instruction and none of the instructions advise the jury what acts and duties the master is bound to perform towards his employees or servants.

## VI.

Defendants except to third instruction on page 3, which is as follows: "So when a servant is employed in a tunnel the master owes him the duty to use ordinary and reasonable care and diligence to make his place of work as reasonably safe as the nature of the work admits of," for the reason that said instruction is contrary to law and the issues made up in this case, and for the further reason that it may have been the duty of the servants working in the tunnel to have made the place safe. [194]

## VII.

Defendants except to third instruction on page 4, which is as follows: "You are instructed that the servant does not assume the extraordinary or unusual risks of the employment, but on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knew or may have known in the exercise of reasonable care, except that he does not assume such risks as are created by the master's negligence," for the reason that same is contrary to law, and for the further reason that the servant does assume the extraordin-

ary and unusual risks of the employment if such risks and perils are incident to the work and are known or should be known to the plaintiff.

#### VIII.

*Defendant* excepts to the 4th instruction on page 4, which is as follows: "Where the negligence or want of ordinary care and caution of a servant so far contributed to his injury that it would not have occurred but for such negligence, he cannot as a rule recover. But if the injury is caused by the gross or wilful negligence of the master or his agents, or if the consequences of the servant's negligence might have been avoided by the exercise of ordinary and reasonable care on the part of the master or his agents, then the servant could recover though himself negligent," for the reason that it is contrary to law, and for the further reason that it does not instruct the jury as to what is contributory negligence, and requires the master and his agents to exercise ordinary and reasonable care to prevent the consequences of the servant's negligence.

#### IX.

*Defendant* excepts to instruction five on page 4, which is as follows: "All servants engaged in the same common work, without any dependence upon or relation to each other, except as colaborers without rank, under the direction and management of the master or his agents are fellow-servants," for the reason that said instruction is contrary to law and is not the proper rule to determine who are fellow-servants and for the further reason that said instruction [195] is given on the assumption that if the

plaintiff cannot recover under the Employers' Liability Acts then he might recover under the common law.

### X.

*Defendant* excepts to second instruction on page 5, which is as follows: "To render the master not liable for an injury to a servant caused by the negligence of a fellow-servant, it must be shown that the injury directly resulted by reason of such fellow-servant's negligence, that is, that it was the proximate cause thereof and not the negligence of the master," for the reason that said instruction is erroneous and contrary to law, and that said instruction is given for the purpose of permitting recovery under the common law when this action is based upon the Employers' Liability Acts.

### XI.

*Defendant* excepts to instruction two on page 6, which is as follows: "That every common carrier engaged in commerce in the Territory \* \* \* shall be liable in damages to any person suffering injury while he is so employed by such carrier in any of said Territories, for such injury \* \* \* resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

"That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act, to recover



damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee," for the reason that it was not shown in the evidence that the plaintiff was working on any of the cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment, as plaintiff was working on a tunnel and for the further reason that [196] the pleadings do not allege that either of the defendants was a common carrier.

## XII.

*Defendant* excepts to instruction given on page 9, which is as follows: "This is your last case at this term of court, of which you have had several on the same general subject of personal injuries," for the reason that said instruction impliedly told the jury that they should consider other instructions that they had received in other cases and it is not shown that any other case was similar to this case.

## XIII.

Defendants except to the refusal of the Court to give the second instruction requested by the defendants.

## XIV.

Defendants except to the refusal of the Court to give the third instruction requested by the defendants.

## XV.

Defendants except to the refusal of the Court to give the fourth instruction requested by the defendants.



XVI.

Defendants except to the refusal of the Court to give the sixth instruction requested by the defendants.

XVII.

Defendants except to the refusal of the Court to give the eighth instruction requested by the defendants.

XVIII.

Defendants except to the refusal of the Court to give the eleventh instruction requested by the defendants.

XIX.

Defendants except to the refusal of the Court to give the thirteenth instruction requested by the defendants. [197]

XX.

Defendants except to the refusal of the Court to give the fourteenth instruction requested by the defendants.

XXI.

Defendants except to the refusal of the Court to give the sixteenth instruction requested by the defendants.

XXII.

Defendants except to the refusal of the Court to give the seventeenth instruction requested by the defendants.

XXIII.

Defendants except to the refusal of the Court to give the eighteenth instruction requested by the defendants.

XXIV.

Defendants except to the refusal of the Court to give the nineteenth instruction requested by the defendants.

XXV.

Defendants except to the refusal of the Court to give the twentieth instruction requested by the defendants.

XXVI.

Defendants except to the refusal of the Court to give the twenty-first instruction which is as follows: "You are instructed that this case is based upon the Acts of 1906 and 1908 regarding common carriers. You are instructed that before the plaintiff can recover in this case he must prove by the preponderance of evidence that both of the defendants were common carriers and unless you so find, the plaintiff cannot recover in this action."

Exceptions allowed.

PETER D. OVERFIELD,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 10, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

[198]

*In the District Court for the Territory of Alaska,  
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KA-  
TALLA COMPANY, a Corporation,  
Defendants.

### **Judgment.**

This cause came on for trial on the 6th day of May, 1913, in the above-named court at the special Cordova term called for April, 1913, the plaintiff appearing in person and by his counsel, E. E. Ritchie, and the defendants appearing by their counsel, R. J. Boryer. A jury of twelve men was duly selected, impaneled and sworn to try the cause. The parties introduced their evidence and rested, and after argument by counsel and instructions by the Court the jury retired to deliberate upon their verdict on the 7th day of May, 1913.

Thereafter, upon the 8th day of May, 1913, the jury returned into court with their verdict, whereby they found for the plaintiff and against the defendants, and each of them, and assessed the plaintiff's damages recoverable from the defendants at \$2,125.

On the 10th day of May, 1913, the defendants filed a motion for a new trial of said cause, which motion was on the same day argued by counsel for defendants and was by the Court denied, to which order of

the Court denying said motion defendants by their counsel then and there excepted and said exception was by the Court allowed.

Wherefore, by reason of the law and the premises hereinbefore recited, IT IS ORDERED AND ADJUDGED by the Court here that the said plaintiff do have and recover from the defendants, [199] and each of them, the sum of \$2,125 and the costs of this action, taxed at \$78.10.

Done at Cordova, Alaska, this 10th day of May, 1913.

PETER D. OVERFIELD,  
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 10, 1913. Angus McBride, Clerk. By K. L. Monahan, Deputy.

Entered Court Journal No. C.-2, page No. 101.  
[200]

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*In the District Court for the Territory of Alaska,  
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KA-  
TALLA COMPANY, a Corporation,  
Defendants.

**Order Allowing, Certifying and Settling Bill of Exceptions.**

It appearing to the Court that the defendant has prepared and duly served upon attorney for the plaintiff within due time a proposed Bill of Exceptions, and said proposed Bill of Exceptions having been delivered to the Clerk of the above-entitled Court for the Judge thereof, and the Clerk having delivered said proposed Bill of Exceptions to said Judge, and said Judge of said Court having duly designated the 25th day of June, A. D. 1913, as the time at which he would settle the Bill of Exceptions, and both plaintiff's and defendant's attorneys having been informed of the time for settling the Bill of Exceptions as designated by the Judge, and the said matter coming regularly on for hearing for the purpose of settling the said Bill of Exceptions on the 25th day of June, A. D. 1913, and the attorneys for both plaintiff and defendant being present,

IT IS THEREUPON AND IS HEREBY ORDERED that the proposed Bill of Exceptions be allowed and the same shall be and is hereby settled and allowed as a Bill of Exceptions herein, and the same shall be presented to the Judge of this Court for his certificate.

And it further appearing to the Court that said proposed Bill of Exceptions conforms to the truth and is in proper form,— [201]—

IT IS THEREFORE ORDERED that the said Bill is a true Bill of Exceptions, and the same is hereby approved, allowed and settled and ordered filed and made a part of the record of this cause.



Done in open court this the 25th day of June, A. D. 1913.

FRED M. BROWN,  
Judge.

[Endorsed]: Filed in the District Court for the Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. Entered Court Journal No. 7, page No. 280. [202]

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*In the District Court of the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KA-  
TALLA COMPANY, a Corporation,  
Defendants.

**Stipulation [Waiving Service of Papers].**

WHEREAS, E. E. Ritchie, attorney for the plaintiff in the above-entitled action, is contemplating a trip to the States, to be gone possibly thirty (30) days:

NOW, THEREFORE, it is hereby stipulated by and between the plaintiff's attorney for and on behalf of the plaintiff and the attorney for the defendant, that the service of all papers in the above-entitled action in the appeal or any other steps taken in said case be waived by the attorney for the plaintiff, and that same may be filed in the office of the

Clerk of Court and be of the same effect as if served upon the plaintiff or his attorney.

Dated this the 10th day of May, A. D. 1913.

E. E. RITCHIE,  
Attorney for Plaintiff,  
R. J. BORYER,  
Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 16, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [203]

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*In the District Court for the Territory of Alaska,  
Third Division.*

C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KA-  
TALLA COMPANY, a Corporation,

Defendants.

**Assignment of Errors.**

Comes now the defendants in the above-entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause:

I.

The Court erred in permitting witness James Heney to testify relative to light in tunnel at time not connected with accident; and overruling defend-

ant's exception to introduction of said testimony, same being duly excepted to and exception allowed, which testimony was as follows:—

Q. (Mr. RITCHIE.) “During that time when you were working in the tunnel, how was the place lighted?”

A. “Sometimes it was lighted up pretty good.”

Q. “How was it lighted in the first place, describe the light?”

Mr. BORYER.—“We object to the introduction of any testimony except as to the light at the time of the injury.”

Mr. RITCHIE.—“It goes to the company's negligence.”

Objection overruled. Defendant allowed an exception.

A. “We had carbide lights there—it threw very good lights, we could see all around the tunnel; in fact we had two of them part of the time and we had a couple of gasoline torches.”

Q. “Those carbide lights, what power were they, if you know?” [204]

A. “I couldn't tell the power of them, but they threw a good light.”

Q. “How far would they throw light?”

A. “Two or three hundred feet.”

Q. “Would they light the tunnel?”

A. “They would light the tunnel.”

Q. “Describe them and how they were placed.”

A. “These carbide lights, they stood in a tank

about that high (indicating)—you put the carbide into a little tank and this tank is full of water and there is a box in it and you put a light over it and put a match to it and it forms gas and lets the light through.”

Q. “That threw a very clear light?”

A. “That threw a very clear light.”

Q. “When these were in use in the tunnel how would the light in the tunnel compare with the ordinary well-lighted city street?”

A. “Yes, it was as good a light as you see in a city street.”

Q. “Did they take those lights away?”

A. “Yes, they took one of them away and they took the carbide they had for the other one down to the wreck with them.”

Q. “That was in what month?”

A. “In the month of January, 1912.”

Q. “They took them down to bridge 75A?”

A. “Where that rotary was hurt, yes.”

Q. “After they ceased to have the carbide lights, how did they light the tunnel?”

A. “We had some gasoline torches there.”

Q. “Describe them.”

A. “It was a lamp you hang up on a post and there was a lot of holes in it; when you put a match to it it threw the light out, may be five or six lights would spread out through the torch.”

[205]

Q. “How much light did they throw?”

A. “Quite a bit but not as much as the other.”

Q. "Did they make the tunnel comparatively light?"

A. "Not all over the tunnel, no."

Q. "How far could you see from these lights and see quite distinctly?"

A. "Twenty or twenty-five feet probably."

Q. "How long before you had this accident was it that they took those lights away?"

A. "I couldn't say exactly—I think they were gone four or five days."

Q. "After that what lights did you have?"

A. "We used the gasoline torches and we ran out of gasoline and then we had only lanterns, three lanterns."

Q. "What kind of lanterns were those?"

A. "Small little ordinary lanterns that you pack around when you are going out at night."

Q. "Such as an individual carries with him to go home by?"

A. "Yes, sir."

Q. "You had been working solely by those lights for several days?"

A. "By lanterns?"

Q. "Yes."

A. "Yes, we had been working two or three days that I know of."

## II.

The Court erred in permitting witness W. H. Slimpet to testify relative to lantern or torch being placed in hole or shaft, and overruling defendant's exception to introduction of said testimony, same being duly excepted to and exception allowed which



testimony was as follows:

Q. (Mr. RITCHIE.) "If there had been a lantern placed low there, a lantern or a torch, in a sort of narrow hole or shaft right on the side of that big hole, could a man have seen it through that smoke, if he was approaching the hole?"

Mr. BORYER.—"We object to that as incompetent, irrelevant and immaterial."

Objection overruled. Defendant allowed an exception. [206]

A. "If the light was one side of the tunnel and you were on the other, you couldn't have seen it—the smoke was too dense."

Q. "If the light had been directly in front of you as you approached it?"

A. "Yes, you could have seen if there was a light there."

### III.

The Court erred in making the following statement after the following questions asked of Slimpert:

A. (The WITNESS.) "Mr. Forrester told us, when Mr. Kilsen was there and was complaining of the smoke one day, Mr. Forrester said—if it gets too thick with smoke, to sit down and quit working or go downstairs."

Q. (Mr. BORYER.) "He told you to quit working?"

A. "Yes, he told us to quit working or go down—who wanted to stay up there, to stay up there and who wanted to go down, to go down."

By the COURT.—“Was Mr. Heney there at that time?”

Mr. RITCHIE.—“We move to strike it out.”

By the COURT.—“It may stand; of course it wouldn't be binding on Heney unless the jury find that Heney received such instructions.”

#### IV.

The Court erred in permitting plaintiff to read and introduce in evidence printed heading of waybill against defendant's objection which was overruled and exception taken and allowed, testimony of which is as follows:

Q. (Mr. RITCHIE.) “You have seen the waybills that they used, have you not?”

A. “Yes, sir.”

Q. “I will ask you whether those are the ones that were used. (Handing witness paper.) That is the form they used?”

A. “That is the form of the waybill that they used to the best of my knowledge, yes, sir— I wouldn't be positive about it.”

Mr. RITCHIE.—“This is an exhibit in another case and I would like to read the printed heading of this into the record.” [207]

Mr. BORYER.—“We object to it for the reason that this bill of lading is under date of March, 1911, and for the reason that it is possible that either the Katalla Company or the Copper River & Northwestern Railway Company may have been doing business in March, 1911, at the time this bill of lading is dated and may have gone out of business before the date

of this accident.”

Objection overruled. Defendant allowed an exception.

Mr. RITCHIE.—“I will read the printed heading of this—Katalla Company. (Constructing and operating Copper River & Northwestern Railway Co.) Straight bill of lading—Original. On the usual printed form.”

V.

The Court erred in permitting plaintiff to introduce in evidence by Lattin the following questions and in *referring* to strike same to which objection was made, same being overruled and exception taken and allowed:

Q. (Mr. RITCHIE.) “How did the way-bills read up to a few months ago for freight, that is, the heading? I will ask you if that is the present form. (Handing witness paper.)”

A. “This is the bill of lading.”

Q. “Is that the present form in use?”

A. “We are using that at present.”

Q. “And prior to the time you began using that, did you have a form with the Katalla Company at the head of it?”

A. “Yes, sir.”

Q. “It read, The Katalla Company, Constructing and Operating the Copper River & Northwestern Railway Company?”

A. “Yes, sir.”

Mr. BORYER.—“We move to strike the answer and I want an exception, for the reason that the bill of lading says: Katalla Company

operating and constructing the Copper River & Northwestern Railway Company; the fact that the Katalla Company was constructing does not show that there was any relation between the Katalla Company and the Copper River & Northwestern Railway Company, because the Katalla Company might have been an independent contractor.”

Objection overruled and motion to strike denied.

Defendant allowed an exception. [208]

## VI.

The Court erred in permitting plaintiff to read into record statements of Katalla Company filed with Clerk of Court as yearly statements, to which defendant excepted and exceptions were allowed, which statements were as follows:

Q. (Mr. RITCHIE.) “Is the clerk of the court for the Third Division the custodian of all the papers filed by foreign corporations doing business in this division.”

A. “Yes, sir.”

Q. “Among those corporations is the Katalla Company one?”

A. “Yes, sir.”

Q. “State what those papers are. (Handing witness papers.)”

A. “They seem to be numerous corporation papers of the Katalla Company, among which are original articles and yearly statements.”

Q. “Have you the articles there—a copy of the articles filed?”

A. “It is called certificate of incorporation; I

presume that is the one.”

Q. “Get out the statements for 1911 and 1912.”

Mr. RITCHIE.—“Mr. Boryer, will you admit that the Katalla Company was incorporated for the purpose of constructing, incorporated under the laws of New York and doing business in Alaska as a construction company and for the constructing of railroad and—”

Mr. BORYER.—“I admit that it was a construction company, organized for the purpose of constructing railroads.”

Q. (Mr. RITCHIE.) “Have you found the statements for 1911 and 1912?”

A. “Yes, sir, here they are.”

Mr. RITCHIE.—“I want to read into the record part of that paragraph (handing to Mr. Boryer). We plead that the Katalla Company is the agent of the Copper River & Northwestern Railway Company, doing certain work for it of which the public is not fully informed—I want to read what the company says about its own assets.”

Mr. BORYER.—“I have no objection to that.”

Mr. RITCHIE.—“This is the statement for 1911. The fifth paragraph recites that the assets of said corporation consist of contract for building a railroad in Alaska, material on hand and claim against R. R. Company for work already performed, which under the terms of contract is not yet payable. The fifth paragraph



in the statement for 1912 [209] reads—The assets of said corporation consist of contract for building a railroad in Alaska, material on hand and claim against Railroad Company for work already performed, which under terms of contract is not yet payable.”

Mr. BORYER.—“We object to the introduction for the reason that the statements as read from the papers do not show that these assets were assets of the Copper River & Northwestern Railway Company, and do not designate or say what assets it is or what railroad.”

Mr. RITCHIE.—“I think we will connect it up by other testimony.”

By the COURT.—“It may be admitted.”

To which ruling of the Court counsel for defendant is allowed an exception.

#### VII.

The Court erred in overruling defendant’s Motion to Quash Service on Katalla Company, to which ruling defendant duly excepted and exception was allowed.

#### VIII.

The Court erred in overruling defendant’s motion to make More Definite and Certain and Motion to Strike, to which ruling defendant excepted and exception was allowed.

#### IX.

The Court erred in denying the Motion of the plaintiff in error made after the defendant in error rested his case, for a nonsuit of said action, which motion was as follows as to both defendants:

## I.

“That this action is based on the Act of 1908, commonly known as the Employers’ Liability Act, and the plaintiff has failed to establish that both defendants were doing a common carrier business. That in order for plaintiff to prevail in this action, having based his cause of action upon the aforesaid Act, it is necessary that he establish that both the Copper River & Northwestern Railway Company and Katalla Company were doing a common carrier business for the reason that the aforesaid Act takes away the common law liability and that they are separate and distinct laws which cannot be joined.”

## II.

“That the plaintiff has failed to establish that he was employed by or working for the Katalla Company at the time he received his injuries.”  
[210]

## III.

“That the plaintiff has admitted that he was familiar with and knew the condition of the place where he stepped from and was injured. Has admitted that at the time he was injured the tunnel was full of smoke, the train had passed the point where he was standing and he walked into the smoke ahead of him and that all of the other employees working with him stood still according to instructions given them by the foreman.”

## IV.

“For the further reason that the plaintiff has

failed to make out a case against these defendants.”

### X.

The Court erred in denying the motion of the plaintiff in error made at the close of the case for a Directed Verdict on behalf of both defendants, to which defendants excepted and exception was allowed, which Motion was same as to both defendants and was as follows:

### I.

“That this action is based on the Act of 1908, commonly known as the Employers’ Liability Act, and the plaintiff has failed to establish that both defendants were doing a common carrier business. That in order for plaintiff to prevail in this action, having based his cause of action upon the aforesaid Act, it is necessary that he establish that both the Copper River & Northwestern Railway Company and Katalla Company were doing a common carrier business, for the reason that the aforesaid Act takes away the common-law liability and that they are separate and distinct laws which cannot be joined.”

### II.

“That the plaintiff has failed to establish that he was employed by or working for the Katalla Company at the time he received his injuries.”

### III.

“That the plaintiff has admitted that he was familiar with and knew the condition of the place where he stepped from and was injured. Has admitted that at the time he was injured the

tunnel was full of smoke, the train had passed the point where he was standing and he walked into the smoke ahead of him and that all of the other employees working with him stood still according to instructions given them by the foreman."

#### IV.

"For the further reason that the plaintiff has failed to make out a case against this defendant." [211]

#### XI.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed:

"I will first proceed to give you the law applicable to the case, in the absence of special statutory provisions which apply only to railroads as common carriers in Alaska, and later give you the law as it exists on the same subject matter, when a defendant employer is a railroad common carrier, and an employee is injured while engaged as a servant in the service of such common carrier."

#### XII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exceptions allowed:

"You are instructed that the rule of law is that between master and servant the master is liable for all accidents occurring in the course of the employment which are not induced by the care-

lessness or improper conduct of the employee or servant."

### XIII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception allowed:

"In other words, the master is bound to use reasonable care and diligence to prevent accident or injury and if he does not he will be responsible for the damages, unless the servant assumed the risk or contributed to the injury through his own negligence, or the negligence of a fellow-servant."

### XIV.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception allowed:

"As between master and servant negligence should be measured by the character and risk of the business engaged in and the degree of care of both master and servant is higher when the lives and limbs are endangered than in ordinary cases."

### XV.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception allowed:

"All acts and duties which the master is bound to perform toward his employees and servants, which he delegated the performance of to others as an agent, then the agent occupies the same place as the master and the master is



deemed present and liable for the manner in which such duties are performed.”

#### XVI.

The Court erred in giving the following instruction, to which [212] plaintiffs in error duly excepted and its exception allowed:

“So when a servant is employed in a tunnel the master owes him the duty to use ordinary and reasonable care and diligence to make his place of work as reasonably safe as the nature of the work admits of.”

#### XVII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception allowed:

“You are instructed that the servant does not assume the extraordinary or unusual risks of the employment but on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knew of or may have known in the exercise of reasonable care, except that he does not assume such risks as are created by the master’s negligence.”

#### XVIII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception allowed:

“Where the negligence or want of ordinary care and caution of a servant so far contributed to his injury that it would not have occurred but

for such negligence, he cannot as a rule recover. But if the injury is caused by the gross or wilful negligence of the master or his agents, or if the consequences of the servant's negligence might have been avoided by the exercise of ordinary and reasonable care on the part of the master or his agents, then the servant could recover though himself negligent."

## XIX.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception allowed:

"All servants engaged in the same common work, without any dependence upon or relation to each other, except as co-laborers without rank, under the direction and management of the master, or his agents, are fellow-servants."

## XX.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception allowed:

"To render the master not liable for an injury to a servant caused by the negligence of a fellow-servant, it must be shown that the injury directly resulted by reason of such fellow-servant's negligence, that is, that it was the proximate cause thereof and not the negligence of the master."

## XXI.

The Court erred in giving the following instruction, to which [213] plaintiffs in error duly excepted and its exception allowed:

“That every common carrier engaged in commerce in the Territories \* \* \* shall be liable in damages to any person suffering injury while he is so employed by such carrier in any of said territories, for such injury \* \* \* resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.”

“That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act, to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.”

## XXII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception allowed:

“This is your last case at this term of court, of which you have had several on the same general subject of personal injured.”

## XXIII.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

“You are instructed that the defendants, Copper River & Northwestern Railway Company and the Katalla Company have plead separately in this action and in order for you to find a verdict against either of the defendants, Copper River & Northwestern Railway Company and the Katalla Company, you must first find from the evidence that the plaintiff was working for either the Katalla Company or the Copper River & Northwestern Railway Company or both and if the evidence fails to show that the plaintiff was working for the Katalla Company, then you are instructed that the plaintiff cannot recover against the Katalla Company and you are further instructed that if the plaintiff fails to show from the evidence that he was working for the Copper River & Northwestern Railway Company, then you are instructed that he cannot recover against the Copper River & Northwestern Railway Company.”

#### XXIV.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

“You are instructed that if you find from the evidence that the plaintiff had been warned that when trains were passing through the tunnel that he should quit work and either come down from the roof [214] of the tunnel or not move around and he failed or refused to obey said orders and he would not have been injured if he



had obeyed said orders and he was injured by refusing to obey said order, then you are instructed that the plaintiff cannot recover in this action."

### XXV.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

"You are instructed that the burden is upon the plaintiff to establish his cause of action by a preponderance of evidence and that the plaintiff cannot recover unless he proves by preponderance of the evidence not only that the defendants were negligent but also that the defendants' negligence was the cause of the injury to the plaintiff and if he fails to establish these facts by the preponderance of the evidence the plaintiff cannot recover."

### XXVI.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

"You are instructed that the plaintiff is presumed to know the dangers that he has an opportunity to observe and that he must inform himself of open, obvious risks and if he does not do this and is injured by reason of his failure to do so, then he cannot recover."

### XXVII.

The Court erred in refusing to give to jury the fol-



lowing instruction requested by the plaintiffs in error, which was duly excepted to and exception allowed, which instruction was as follows:

“You are instructed that if the plaintiff continued working with knowledge actual or constructive of dangers which an ordinary prudent man would refuse *or* subject himself to, he is guilty of contributory negligence and cannot recover.”

### XXVIII.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to and exception allowed, which instruction was as follows:

“You are instructed that if you find that the Katalla Company was not doing a common carrier business at the time that the plaintiff was injured, and doing a common carrier business over that portion of the railroad line upon which the plaintiff was working and at the place where he was injured, you are instructed that the plaintiff cannot recover in this action.” [215]

### XXIX.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to and exception allowed, which instruction was as follows:

“You are instructed that plaintiff has admitted in this case that he was working as a carpenter at the time of his injury and that he was familiar with and knew that at the place where he fell over had no guard-rail across it, which

fact was known to him for several days prior to the accident and at the time of the accident, therefore you are instructed that if the plaintiff continued working with knowledge of these facts as he has testified that he did have and if you further find that he knew or ought to have known as a reasonable prudent man that it was dangerous not to have a guard-rail at this place and no one in authority had promised to have a guard-rail or other protection at this place, then you are instructed the plaintiff assumed the risks incident to no guard-rail being at the point or place where he fell."

### XXX.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to and exception allowed, which instruction was as follows:

"You are instructed that plaintiff has admitted in this case that he was working as a carpenter at the time of his injury and that he was familiar with and knew that at the place where he fell over had no guard-rail across it, which fact was known to him for several days prior to the accident and at the time of the accident, therefore you are instructed that if the plaintiff continued working with knowledge of these facts as he has testified that he did have and if you further find that he knew or ought to have known as a reasonable prudent man that it was dangerous not to have a guard-rail at this place and no one in authority had promised to

have a guard-rail or other protection at this place, then you are instructed that the plaintiff assumed the risks incident to no guard-rail being at the point or place where he fell and cannot recover in this case.”

## XXXI.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

“You are instructed that the plaintiff has admitted that he knew at the time of his accident and for several days prior thereto that there was no guard-rail or other protection at the point or place where he fell, and has admitted that he knew that trains were running through this tunnel and that smoke from the engines surrounded the place where he was working, and that while he was surrounded by smoke from the engine he voluntarily continued working when he knew that he could not see where he was walking and that he did proceed and while walking stepped off of the point or place where he claims there was no guard-rail; therefore you are instructed that the plaintiff assumed the risks of walking or trying to work at that time.” [216]

## XXXII.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

“You are instructed that the plaintiff has ad-

mitted that he knew at the time of his accident and for several days prior thereto that there was no guard-rail or other protection at the point or place where he fell and has admitted that he knew that trains were running through this tunnel, and that smoke from the engines surrounded the place where he was working and that while he was surrounded by smoke from the engine he voluntarily continued working when he knew that he could not see where he was walking and that he did proceed and while walking stepped off of the point or place where he claims there was no guard-rail; therefore you are instructed that the plaintiff assumed the risks of walking or trying to work at that time, and he is guilty of contributory negligence."

### XXXIII.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to and exception allowed, which instruction was as follows:

"You are instructed that the plaintiff has admitted that he knew at the time of his accident and for several days prior thereto that there was no guard-rail or other protection at the point or place where he fell and has admitted that he knew that trains were running through this tunnel and that smoke from the engines surrounded the place where he was working and that while he was surrounded by smoke from the engines he voluntarily continued working when he knew that he could not see where he was walking and



that he did proceed and while walking stepped off of the point or place where he claims there was no guard-rail; therefore you are instructed that the plaintiff assumed the risks of walking or trying to work at that time, and he cannot recover in this case."

## XXXIV.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to and exception allowed, which instruction was as follows:

"You are instructed that the plaintiff admitted that he was working while he claims the tunnel or place of work was not sufficiently lighted for several days. You are instructed that if the [217] plaintiff knew this and continued at work, that the plaintiff assumed the risks incident to his employment by reason of the fact that the tunnel was not sufficiently lighted."

## XXXV.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to and exception allowed, which instruction was as follows:

"You are instructed that the plaintiff admitted that his general work was that of assisting in retimbering and strengthening the tunnel for the purpose of making same safe. You are therefore instructed that the plaintiff assumed all of the risks of his employment in his work of retimbering and strengthening said tunnel."



## XXXVI.

The Court erred in refusing to give to jury the following instruction requested by the plaintiffs in error, which was duly excepted to and exception allowed, which instruction was as follows:

“You are instructed that this case is based upon the Acts of 1906 and 1908 regarding common carriers. You are instructed that before the plaintiff can recover in this case he must prove by the preponderance of evidence that both of the defendants were common carriers and unless you so find, the plaintiff cannot recover in this action.”

The Court erred in denying the motion of defendants (plaintiffs in error) for a new trial herein, and its order and judgment overruling said motion and granting judgment in favor of plaintiff and against said defendants for the amount of the verdict found by the jury in favor of plaintiff with costs; which order and judgment were duly excepted to by the defendants and exception allowed by the Court. Said motion was based on all the files, records and proceedings herein and was made upon the following grounds specified therein and on each thereof, to wit:

Comes now the defendant, Copper River & Northwestern Railway Company and Katalla Company, and moves the Court for a New Trial in this action for the following reasons:

## I.

“That the damages allowed by the jury were excessive and were given under influence of passion and prejudice.”

## II.

“That there was insufficiency of evidence to justify the [218] Verdict and that the same is against the law.”

## III.

“Error in law occurring at the trial and excepted to by the party making the application.”

## IV.

“For the reason that the plaintiff based this action on the Acts of 1906, 1908 and 1910, commonly known as the Employers’ Liability Act regarding common carriers, that there was no evidence introduced in this case sufficient for the jury to find that both the Copper River & Northwestern Railway Company and the Katalla Company were each of both doing a common carrier business, and that the verdict in this case was rendered against both the Copper River & Northwestern Railway Company and the Katalla Company, and that the evidence failed to show that either of said defendants were connected in any way with each other in doing a common carrier or other business.”

## V.

“For the further reason that the Court instructed the jury both under the common-law liability and the liability under the Acts of 1906, 1908 and 1910, commonly known as the Employers’ Liability Act, regarding common carriers; that the two remedies are separate and distinct and that the plaintiff suing under the aforesaid Acts cannot recover under the common law liability.”

## VI.

“For the further reason that the plaintiff admitted that he was working for the Katalla Company on a platform that was without a guard-rail; that he knew at the time and for several days prior thereto that said platform did not have a guard-rail on it and knew the exact position and condition of the point or place where he claims he was injured and by which he was injured; that the evidence further showed that he with three other coworkers working with him, no foreman being present, were performing work on the scaffold or platform and that the plaintiff himself had at prior times, when trains were passing through the tunnel, gone down from this platform in order to avoid smoke from the trains, and on this particular day and time this plaintiff knowing that the tunnel was full of smoke, claims to have started from the place where he was standing to walk toward the end of the tunnel where he was injured, for the purpose of putting down some braces; that the plaintiff admitted that the smoke was so thick that he was unable to see the floor and that he was walking to this point to put some braces on the floor, that all of the other men working with him admitted that they stood still at this time; they also admitted that they could not see and had received instructions before that when trains passed through the tunnel and the smoke ascended that they should remain still; that the plaintiff knowing the condition of the tunnel and knowing that it was impossible for him to perform the work which he claims he started to do, attempted [219] to walk through the smoke and walked off

the point or place where he claims there was no guard-rail, although he admits that he knew there was no guard-rail at this point at that time and for several days prior thereto and admits that there was sufficient lumber convenient which he could have used to put on a guard-rail."

[Signed] "R. J. BORYER,  
Attorneys for Defendants."

WHEREFORE, the defendants, plaintiffs in error, pray that said judgment may be reserved, vacated and set aside, and that the verdict found by the jury at the close of the trial herein on which judgment was based may be vacated and set aside, and that said action be ordered dismissed, and for such other and further relief, or both, in the premises, as may be proper.

R. J. BORYER,  
Attorney for Copper River & Northwestern Railway  
Company, Plaintiff in Error.

BOGLE, GRAVES, MERRITT & BOGLE,  
Attorneys for Katalla Company, Plaintiff in  
Error.

[Endorsed]: Filed in the District Court for the  
Territory of Alaska, Third Division. June 25th,  
1913. Angus McBride, Clerk. By Thos. S. Scott,  
Deputy. [220]

*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KAT-  
ALLA COMPANY, a Corporation,

Defendants.

**Petition for Writ of Error.**

Comes now the Copper River & Northwestern Railway Company, a corporation, and the Katalla Company, a corporation, the defendants herein, and complains and stated that on the 10th day of May, A. D. 1913, the above-entitled court entered judgment herein in favor of the plaintiff above named, and against the defendants above named, in which judgment, and in the proceedings had prior thereto, in the above-entitled cause, certain errors were committed to the prejudice of these defendants, all of which will appear in the detail from the Assignment of Errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record and proceedings, with all things concerning the same, duly authenticated, be sent to the United States Circuit Court of



Appeals for the Ninth Circuit.

And defendants further pray for an order fixing the amount of bond for a supersedeas in said cause.

Dated this, the 25th day of June, A. D. 1913.

R. J. BORYER,

Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [221]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KAT-  
ALLA COMPANY, a Corporation,

Defendants.

**Order Allowing Writ of Error.**

On this day came the defendants, the Copper River & Northwestern Railway Company, a corporation, and the Katalla Company, a corporation, by their attorney, and filed herein and presented to the Court its petition praying for the allowance of a Writ of Error, and an assignment of errors to be urged by it, praying also that a transcript of the record and proceedings in said cause, with all things concerning the same, be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that

the amount of bond for supersedeas in said cause be fixed. On consideration whereof, the Court does hereby allow a Writ of Error as prayed for.

IT IS FURTHER ORDERED that a bond in the sum of Three Thousand (\$3,000.00) Dollars, conditioned according to law, be executed in behalf of the above named defendants, with good and sufficient surety, to be approved by the undersigned Judge, and that upon said bond being executed, approved and filed, said judgment in this cause shall forthwith be superseded, and all proceedings in this cause stayed until a final determination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this the 25th day of June, A. D. 1913.

FRED M. BROWN,

Judge for the District Court for the Territory of  
Alaska, Third Division. [222]

[Endorsed]: Filed in the District Court for the Territory of Alaska, Third Division. June 25th, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. 7, page No. 282. [223]

*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KAT-  
ALLA COMPANY, a Corporation,  
Defendants.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS,  
that we, the Katalla Company, a corporation, and the  
Copper River & Northwestern Railway Company, a  
corporation, defendants in the above-entitled cause of  
action, as principals, and S. Blum and ———, as  
sureties, are held and firmly bound unto James  
Heny, plaintiff above named, in the sum of Three  
Thousand (\$3,000.00) Dollars lawful money of the  
United States, to be paid to the said plaintiff, his  
heirs, executors, administrators and assigns, for  
which payment, well and truly to be made, we do  
hereby bind ourselves, our and each of our successors  
and assigns, jointly and severally, firmly by these  
presents.

Sealed with our seals and dated at Valdez, this the  
25 day of June, A. D. 1913.

WHEREAS, lately, at a District Court of the Ter-  
ritory of Alaska, Third Division, in a suit pending  
in said Court, between James Heney, plaintiff, and

Copper River and Northwestern Railway Company and Katalla Company, corporations, a judgment was rendered in favor of said plaintiff and against said defendants in the sum of Two Thousand One Hundred and Twenty-five (\$2,125.00) Dollars and costs, and the said Copper River & Northwestern River Railway [224] Company and the Katalla Company, defendants, having obtained a Writ of Error and filed a copy thereof in the office of the Clerk of said Court, to reverse the judgment in the aforesaid action, and having obtained a citation directed to the above-named plaintiff, citing and admonishing him to appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, in said Circuit.

Now, therefore, the condition of the above obligation is such, that if the Copper River & Northwestern Railway Company and the Katalla Company shall prosecute its Writ of Error to effect and shall answer all costs and damages that may be awarded against it, including all just damages for delay and costs and interest on the appeal, if it shall fail to make its plea good, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

It is hereby expressly agreed by said sureties that in case of a breach of any condition hereof, the above-named District Court of the United States for the Territory of Alaska, Third Division, may, upon notice to said sureties of not less than ten days, proceed summarily in the above-entitled action to ascertain the amount which said sureties are bound to

pay on account of such breach, and render judgment therefor against said sureties, and award execution therefor.

COPPER RIVER & NORTHWESTERN  
RAILWAY CO.

By R. J. BORYER,  
Attorney.

KATALLA COMPANY,

By R. J. BORYER,  
Attorney. [225]  
S. BLUM,  
Surety.

---

,  
Surety.

The foregoing bond is hereby approved as a bond on a Writ of Error and Supersedeas Bond, this the 25 day of June, A. D. 1913.

FRED M. BROWN,  
Judge of the District Court for the Territory of  
Alaska, Third Division.

I approve the above bond.

E. E. RITCHIE,  
Attorney for Plaintiff and Defendant in Error.

[Endorsed]: Filed in the District Court for the  
Territory of Alaska, Third Division. June 25, 1913.  
Angus McBride, Clerk. By Thos. S. Scott, Deputy.  
[226]



*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KAT-  
ALLA COMPANY, a Corporation,  
Defendants.

**Writ of Error [Original].**

The President of the United States of America, to  
the Honorable Judge of the District Court for  
the Territory and District of Alaska, Third Divi-  
sion, Greeting:

Because in the record and proceedings, as also in  
the rendition of the judgment upon a verdict, which  
is in the said District Court before you, or some of  
you, between James Heney, the original plaintiff,  
and the defendant in error, and the Copper River &  
Northwestern Railway Company, and the Katalla  
Company, the original defendants and the plaintiffs  
in error, manifest error hath happened to the  
damage of said Copper River & Northwestern  
Railway Company, and Katalla Company, plain-  
tiffs in error, as by their answer, appear, we be-  
ing willing that error, if any hath been, should  
be duly corrected and full and speedy justice done to  
the parties aforesaid, in this behalf, do command you,  
if judgment be therein given, that then, under your

seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same in San Francisco, in said Circuit, on the 25th day of July, A. D. 1913, and that the record and proceedings aforesaid being inspected, the said [227] Circuit Court of Appeals may cause further to be done therein to correct that error, which of right and according to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 25th day of June, in the year of our Lord One Thousand Nine Hundred and Thirteen.

[Seal] ANGUS McBRIDE,  
Clerk of the District Court for the Territory and District of Alaska, Third Division.

Allowed by:

FRED M. BROWN,  
Presiding Judge in the District Court for the Territory and District of Alaska, Third Division.

[Endorsed]: Filed in the District Court for the Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. 7, page No. 301. [228]

Due and legal service is hereby accepted this the 25th day of June, A. D. 1913, by receiving a true and correct copy of Writ of Error in this case.

E. E. RITCHIE,  
Attorney for Plaintiff and Defendant in Error.  
[229]

*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

**vs.**

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KA-  
TALLA COMPANY, a Corporation,  
Defendants.

**Writ of Error [Copy].**

The President of the United States of America, to  
the Honorable Judge of the District Court for  
the Territory and District of Alaska, Third Di-  
vision, Greeting:

Because in the record and proceedings, as also in  
the rendition of the judgment upon a verdict, which  
is in the said District Court before you, or some of  
you, between James Heney, the original plaintiff,  
and the defendant in error, and the Copper River  
& Northwestern Railway Company and the Katalla  
Company, the original defendants and the plaintiffs  
in error, manifest error hath happened to the dam-  
age of said Copper River & Northwestern Railway  
Company, and Katalla Company, plaintiffs in error,  
as by their answer appear, we being willing that error,  
if any hath been, should be duly corrected and full and  
speedy justice done to the parties aforesaid in this  
behalf, do command you, if judgment be therein  
given, that then, under your seal, distinctly and

openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same in San Francisco, in said Circuit, on the 25th day of July, A. D. 1913, and that the record and proceedings aforesaid being inspected, the said [229a] Circuit Court of Appeals may cause further to be done therein to correct that error, which of right and according to law and custom of the United States ought to be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 25th day of June, in the year of our Lord One Thousand Nine Hundred and Thirteen.

[Seal] ANGUS McBRIDE,  
Clerk of the District Court for the Territory and District of Alaska, Third Division.

Allowed by: FRED M. BROWN,  
Presiding Judge in the District Court for the Territory and District of Alaska, Third Division.

[Endorsed]: Filed in the District Court, Territory of Alaska. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

Due and legal service is hereby accepted this 25th day of June, A. D. 1913, by receiving a true and correct copy of Writ of Error in this case.

E. E. RITCHIE,  
Attorney for Plaintiff and Defendant in Error.  
[229b]

*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KA-  
TALLA COMPANY, a Corporation,  
Defendants.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS,  
That we, the Katalla Company, a Corporation, and  
the Copper River & Northwestern Railway Com-  
pany, a corporation, defendants in the above-entitled  
cause of action, as principals, and S. Blum and  
———, as sureties, are held and firmly bound  
unto James Heney, plaintiff above named, in the  
sum of Three Thousand (\$3,000.00) Dollars, lawful  
money of the United States, to be paid to the said  
plaintiff, his heirs, executors, administrators and as-  
signs, for which payment, well and truly to be made,  
we do hereby bind ourselves, our and each of our  
successors and assigns, jointly and severally, firmly  
by these presents.

Sealed with our seals and dated at Valdez, this  
the 25th day of June, A. D. 1913.

WHEREAS, lately, at a District Court of the Ter-  
ritory of Alaska, Third Division, in a suit pending  
in said court, between James Heney, plaintiff and



the Copper River & Northwestern Railway Company and Katalla Company, corporations, a judgment was rendered in favor of said plaintiff and against said defendants in the sum of Two Thousand One Hundred and Twenty-five (\$2,125.00) Dollars and costs, and the said Copper River & Northwestern River Railway Company and the Katalla Company, defendants, having obtained a Writ of Error and filed a copy thereof in the office of the Clerk of said Court, to reverse the judgment in the aforesaid action, and having obtained a [230] Citation directed to the above named plaintiff, citing and admonishing him to appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, in said Circuit.

Now, therefore, the condition of the above obligation is such, that if the Copper River & Northwestern Railway Company and the Katalla Company shall prosecute its Writ of Error to effect and shall answer all costs and damages that may be awarded against it, including all just damages for delay and costs and interest on the appeal, if it shall fail to make its plea good, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

IT IS HEREBY expressly agreed by said sureties that in case of a breach of any condition hereof, the above named District Court of the United States for the Territory of Alaska, Third Division, may, upon notice to said sureties of not less than ten days, proceed summarily in the above-entitled action to

ascertain the amount which said sureties are bound to pay on account of such breach, and render judgment therefor, against said sureties, and award execution therefor.

COPPER RIVER & NORTHWESTERN  
RAILWAY CO.

By R. J. BORYER,  
Its Attorney.

KATALLA COMPANY,  
By R. J. BORYER,  
Its Attorney.  
S. BLUM,  
Surety.

The foregoing bond is hereby approved as a bond on a Writ of Error and Supersedeas Bond, this the 25th day of June, A. D. 1913.

FRED M. BROWN,  
Judge of the District Court for the Territory of  
Alaska, Third Division.

I approve the above Bond.

E. E. RITCHIE,  
Attorney for Plaintiff and Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [231]

*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KA-  
TALLA COMPANY, a Corporation,  
Defendants.

**Citation on Writ of Error [Original].**

United States of America.

The President of the United States to James Heney,  
Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said court in the city of San Francisco, in the State of California, within thirty days after the date of this citation, pursuant to writ of error filed in the Clerk's office of the District Court for the Territory of Alaska, Third Division, wherein the Copper River & Northwestern Railway Company and Katalla Company, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment is said writ of error mentioned should not be corrected and speedy justice not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the 25th day of June, in the

year of our Lord One Thousand Nine Hundred and Thirteen.

[Seal] FRED M. BROWN,  
Judge in the District Court for the Territory and  
District of Alaska, Third Division.

Entered Court Journal No. 7, page No. 302. [232]

Copy of this Citation received and service acknowledged this the 25th day of June, A. D. 1913.

E. E. RITCHIE,  
Attorney for Defendant in Error.

[Endorsed]: Filed in the District Court for the  
Territory of Alaska, Third Division. June 25th,  
1913. Angus McBride, Clerk. By Thos. S. Scott.  
Deputy. [233]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KA-  
TALLA COMPANY, a Corporation,  
Defendants.

**Citation [on Writ of Error (Copy)].**

United States of America.

The President of the United States to James Heney,  
Greeting:

You are cited and admonished to be and appear  
in the United States Circuit Court of Appeals for

the Ninth Circuit at the courtroom of said Court in the city of San Francisco, in the State of California, within 30 days after the date of this citation, pursuant to writ of error filed in the Clerk's office of the District Court for the Territory of Alaska, Third Division, wherein the Copper River & Northwestern Railway Company and Katalla Company, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment is said writ of error mentioned should not be corrected and speedy justice not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the 25th day of June, in the year our Lord, One Thousand Nine Hundred and Thirteen.

[Seal] FRED M. BROWN,  
Judge in the District Court for the Territory and  
District of Alaska, Third Division. [233a]

Copy of this Citation received and service acknowledged this the 25th day of June, A. D. 1913.

E. E. RITCHIE,  
Attorney for Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [233b]



*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KA-  
TALLA COMPANY, a Corporation,  
Defendants.

**Acknowledgment of Service of Papers on Writ of  
Error.**

Service of the Petition of Writ of Error, of the Assignment of Errors, of the Bond on Writ of Error, of the Citation on Writ of Error, and of Writ of Error in the above-entitled cause, filed in the above-entitled court on the 25th day of June, A. D. 1913, is hereby acknowledged and receipt of true copies thereof on this the 25th day of June, A. D. 1913, is also acknowledged.

R. J. BORYER,

Attorney for Defendant in Error.

[Endorsed]: Filed in the District Court for the Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

[234]

*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KA-  
TALLA COMPANY, a Corporation,  
Defendants.

**Praeceptum for Transcript of Record.**

To the Clerk of the Above-entitled Court:

You will please prepare, certify and transmit forthwith to the United States Circuit Court of Appeal for the Ninth Judicial Circuit, at San Francisco, California, as the record on writ of error to the District Court for the Territory of Alaska, Third Division, a complete transcript of the following files, record and proceedings in the above-entitled cause, to wit:

Complaint.

Marshal's Return.

Motion to Quash Service.

Order on Motion to Quash Service, and Minute Order

Allowing Amendment and Exception Thereto.

Motion to Amend Complaint by Interlineation.

Order Allowing Same and Exception.

Answer of Katalla Company and Copper River &  
Northwestern Railway Company.

Reply to Answer of Katalla Company and Copper  
River & Northwestern Railway Company.

Motion for Nonsuit by Katalla Company and Copper  
River & Northwestern Railway Company.  
[235]

Order on Motion for Nonsuit by Katalla Company  
and Copper River & Northwestern Railway  
Company, and exception to same.

Motion for Directed Verdict by Katalla Company  
and Copper River & Northwestern Railway  
Company.

Defendant's Requested Instructions.

Verdict.

Petition for New Trial.

Order Denying Motion for New Trial, and Excep-  
tions to Same.

Defendants' Exceptions to Instructions.

Order Extending Time to Present and File Bill of  
Exceptions.

Judgment.

Bill of Exceptions and Certificate.

Order Allowing and Settling Bill of Exceptions.

Stipulation Waiving Service of Papers of Appeal.  
Assignment of Errors.

Petition for Writ of Error.

Order Allowing Writ of Error.

Bond on Writ of Error.

Writ of Error and Copy Thereof.

Citation and Copy Thereof.

Acceptance of Service of Papers on Writ of Error.  
Trial Notes.

This Praeceptum.

E. E. RITCHIE,  
Attorney for Plaintiffs in Error.

[Endorsed]: Filed in the District Court for the Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [236]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KA-  
TALLA COMPANY, a Corporation,

Defendants.

**Order Extending Time for Filing and Docketing  
Transcript on Appeal.**

Upon application of R. J. Boryer, attorney for the Copper River & Northwestern Railway Company, a corporation, and the Katalla Company, a corporation, in the above-entitled cause, good cause appearing therefor—

It is ORDERED that the time for filing and docketing the Transcript on Appeal in the above-entitled action with the Clerk of the United States Circuit Court *on Appeal* for the Ninth Circuit be and the same is hereby extended and enlarged to and including the 22d day of September, 1913.

Signed this the 25th day of June, A. D. 1913.

FRED M. BROWN,

Judge.

It is hereby stipulated by and between E. E. Ritchie, attorney for James Heney and R. J. Boryer, attorney for the Copper River & Northwestern Railway Company, and Katalla Company, good cause appearing therefor, that the time of filing and docketing the transcript on appeal with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby extended and enlarged to and including the 22d day of September, 1913.

Dated this the 24th day of June, 1913.

E. E. RITCHIE,

Attorney for James Heney.

R. J. BORYER.

Entered Court Journal No. 7, page No. 284. [237]

[Endorsed]: Filed in the District Court for the Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [238]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KA-  
TALLA COMPANY, a Corporation,  
Defendants.



**Order Allowing, Certifying and Settling Bill of Exceptions.**

It appearing to the Court that the defendant has prepared and duly served upon attorney for the plaintiff within due time a proposed Bill of Exceptions, and said proposed Bill of Exceptions having been delivered to the Clerk of the above-entitled court for the Judge thereof, and the Clerk having delivered said Proposed Bill of Exceptions to said Judge, and said Judge of said court having duly designated the 25th day of June, A. D. 1913, as the time at which he would settle the Bill of Exceptions, and both plaintiff's and defendant's attorneys having been informed of the time for settling the Bill of Exceptions as designated by the Judge, and the said matter coming regularly on for hearing for the purpose of settling the said Bill of Exceptions on the 25th day of June, A. D. 1913, and the attorneys for both plaintiff and defendant being present.

IT IS THEREUPON AND IS HEREBY ORDERED that the proposed Bill of Exceptions be allowed and the same shall be and is hereby settled and allowed as a Bill of Exceptions herein, and the same shall be presented to the Judge of this Court for his certificate.

And it further appearing to the Court that said proposed Bill of Exceptions conform to the truth and is in proper form. [238a]

IT IS THEREFORE ORDERED that the said bill is a true Bill of Exceptions and the same is hereby approved, allowed and settled and ordered filed and

made a part of the record of this cause.

Done in open court this the 25th day of June, A. D. 1913.

FRED M. BROWN,  
Judge.

[Endorsed]: Filed in the District Court for the Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. 7, page No. 280.  
[238b]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KA-  
TALLA COMPANY, a Corporation,  
Defendants.

**Court's Certificate to Bill of Exceptions.**

I, Fred M. Brown, Judge of the above-entitled Court, do hereby certify that the above and foregoing Bill of Exceptions in the above-entitled cause is a true Bill of Exceptions, and the same has been and is approved, allowed and settled and ordered filed and made a part of the record of said cause.

Done in open court this the 25th day of June, A. D. 1913.

FRED M. BROWN,  
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. 7, page No. 281.  
[238c]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. C.—49.

JAMES HENEY,

Plaintiff and Appellee,

vs.

COPPER RIVER & NORTHWESTERN RAIL-  
WAY COMPANY, a Corporation, and KA-  
TALLA COMPANY, a Corporation,  
Defendants and Appellants.

**Certificate of Clerk U. S. District Court to Record.**

United States of America,  
Territory of Alaska,  
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the above and foregoing and hereto annexed 238 pages, numbered from 1 to 238, inc., are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause as the same appears on the records and files in my office. That this transcript is made in accordance with the defendant and appellant's praecipe on file herein and I hereby certify that the foregoing transcript has been prepared and certified to by me, and that

the cost thereof, amounting to \$101.00, was paid to me by R. J. Boryer, attorney for defendant and appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this court at Valdez, Alaska, this 2d day of August, A. D. 1913.

[Seal] ARTHUR LANG,  
Clerk of the District Court for the Territory of  
Alaska, Third Division. [239]

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[Endorsed]: No. 2300. United States Circuit Court of Appeals for the Ninth Circuit. Copper River & Northwestern Railway Company, a Corporation, and Katalla Company, a Corporation, Plaintiffs in Error, vs. James Heney, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filed August 11, 1913.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.





IN THE  
**United States**  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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COPPER RIVER & NORTHWESTERN  
RAILWAY COMPANY, a Corpor-  
ation, and KATALLA COMPANY, a  
Corporation,

*Plaintiffs in Error,*

No. 2300

*vs.*

JAMES HENEY,

*Defendant in Error.*

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UPON WRIT OF ERROR TO THE UNITED STATES  
DISTRICT COURT OF THE TERRITORY  
OF ALASKA, THIRD DIVISION.

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**Brief of Plaintiffs in Error**

---

W. H. BOGLE,  
CARROLL B. GRAVES,  
F. T. MERRITT and  
LAWRENCE BOGLE,

*Attorneys for Plaintiffs in Error.*

610 Central Building, Seattle, Wash.



IN THE  
**United States**  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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COPPER RIVER & NORTHWESTERN  
RAILWAY COMPANY, a Corpora-  
tion, and KATALLA COMPANY, a  
Corporation,

*Plaintiffs in Error,*

*vs.*

JAMES HENEY,

*Defendant in Error.*

No. 2300

---

UPON WRIT OF ERROR TO THE UNITED STATES  
DISTRICT COURT OF THE TERRITORY  
OF ALASKA, THIRD DIVISION.

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**Brief of Plaintiffs in Error**

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This cause comes here on a Writ of Error sued out by the defendants below, to reverse a judgment rendered against said defendants in the court below, in an action at law for the recovery of damages for personal injuries alleged to have been sustained by plaintiff (defendant in error), by reason of the alleged negligence of defendants. For convenience in this brief, the parties will be referred to as designated in the court below.

The complaint (Record, pages 2-6) alleges that defendant, Copper River & Northwestern Railway Company is a Nevada corporation owning and operating, at all times mentioned, a line of railroad from Cordova, to and beyond Chitina, Alaska; that defendant, Katalla Company, is a New York corporation doing business in Alaska, and a subsidiary company of the Copper River & Northwestern Railway Company; that in operating its said line of railway the Copper River Railway Company transacts its business partly through the Katalla Company, which nominally employs and directs many of the men working on the railroad line; that neither plaintiff nor the general public know the precise functions of the Katalla Company, nor its relations to the Copper River & Northwestern Railway Company, but alleges on information and belief that the Katalla Company "is a mere agency of the said Copper River & Northwestern Railway Company, and the operations of said Katalla Company are in reality operations of the Copper River & Northwestern Railway Company, and the Copper River & Northwestern Railway Company is the real employer of men working on its said line in the operation and maintenance of the same."

The complaint further alleges that on January 19, 1912, "plaintiff was working *in the employ* of said Copper River & Northwestern Company, in the *nominal* employ and under the *nominal* direction of said Katalla

Company, *agent* of said Railway Company'' in the tunnel on the railway company's line east of Chitina; that he was "lagging" the sides of a timber structure over part of the tunnel where a cave-in had occurred; that in doing this work plaintiff and others worked upon a platform at the top of the tunnel proper; that the construction of said platform was incomplete and several gaps had been left in it, one extending across the entire width of the tunnel and about six feet of the linear projection thereof; that this gap or open space was negligently left by defendants without guard rails; that the tunnel was dark and defendants negligently failed to place lights adjacent to the gap, and failed to furnish lights to the men working in the tunnel, to be placed adjacent to the gap to warn persons of its location.

It is further alleged that about 3 o'clock in the afternoon of January 19, 1912, when the tunnel was getting darker because of the coming of night, defendants

"wilfully, negligently and wrongfully ran a locomotive drawing a train of cars through said tunnel, said locomotive leaving a dense volume of coal smoke and a suffocating quantity of coal gas in said tunnel still further intensifying the darkness of the tunnel; that because of said smoke and gas in the tunnel at the place where plaintiff was working, plaintiff was wholly unable to see anything, and was unable to breathe without painful, suffocating and sickening inhalation of coal gas; that for the purpose of escaping from said smoke, gas and intense darkness of



the tunnel at the place where he had been working, plaintiff walked slowly and cautiously toward the westerly entrance of said tunnel, to reach which, the same being the only place of exit from said tunnel at that time, it was necessary to pass the said gaps and open space in said platform; that plaintiff proceeded with great care, endeavoring to feel his way, but being confused by the darkness and partially strangled by the inhalation of coal gas as aforesaid, he moved in a state of partial bewilderment, and while groping slowly along said platform he inadvertently stepped into the gap in said platform hereinbefore particularly described and fell to the floor of the tunnel,"

whereby he sustained the injuries complained of.

Defendants answered separately, each denying all the allegations of the complaint, except the fact of their incorporation, and each alleging affirmative defenses of assumption of risk, contributory negligence and negligence of a fellow servant (R., pp. 17-21). The affirmative defenses were denied in replies filed by plaintiff; and the issues as defined by the complaint, answers and replies, came on for trial before Honorable Peter D. Overfield, Judge of said Court, and a jury, on May 6, 1913. A verdict was rendered against both defendants for \$2,125.00. Defendants filed a joint motion for a new trial, which was denied (R., pp. 195-198), and judgment was entered by the Court on the verdict in favor of plaintiff and against both defendants (R., pp. 207-208).

There is very little dispute as to the facts in the case,

and no dispute as to when and how plaintiff sustained his injuries and the extent thereof. No evidence was introduced to prove the allegations of the complaint that the engine was run through the tunnel "wilfully, negligently and wrongfully," nor do we understand any claim of negligence is predicated on running the engine through the tunnel, nor the manner in which it was done.

Neither was any evidence offered by plaintiff to sustain his allegation that he fell while walking toward the entrance of the tunnel "for the purpose of escaping from said smoke, gas and intense darkness of the tunnel at the place where he had been working." The undisputed testimony is that the place of entrance to the platform where plaintiff was working, was in the opposite direction from the open space through which plaintiff fell, which fact he well knew; and he walked toward this opening in order to place a timber in another opening in the platform between where he had been working and this opening; that he walked past the hole he was looking for, and into the large opening beyond. The only negligence which could be claimed under the evidence, is the failure to guard or light the opening into which plaintiff walked.

The defendant, Copper River & Northwestern Railway Company, is a corporation owning a line of railway from Cordova to and beyond the place where plaintiff was injured, all in Alaska, and this line of railway had been in operation for some time prior to the accident in ques-

tion, except when operation was stopped by accidents. At the time of the accident, the operation of the railway had been tied up between Cordova and Chitina for several weeks (R., pp. 142-145).

The defendant, Katalla Company, is a New York corporation organized for the purpose of constructing railways (R., p. 153), but expressly prohibited by its articles of incorporation from engaging in the business of a railway or transportation corporation (R., p. 156). This defendant constructed the railway line of the Copper River & Northwestern Railway Company, and the latter Company had been operating this railway for some six months to a year prior to the accident to plaintiff (R., pp. 147-151). All licenses for operating this railway were taken out by and in the name of the Copper River & Northwestern Railway Company (R., pp. 155, 156).

Several months prior to plaintiff's accident there had been a cave-in in the tunnel on the railway line near Chitina, which the Katalla Company was repairing (R., pp. 2, 28, 30, 55, 114, 146, 154). The record does not show under what arrangement between the defendants the railway line was constructed or the repairs to the tunnel were being made. Plaintiff alleges that defendant, Katalla Company, was the agent of the Copper River & Northwestern Railway Company in making these repairs. The evidence certainly shows nothing more than such agency, or that the Katalla Company was an independent con-

tractor doing the work in question, either of which facts we think would be sufficient to require a reversal of this case as we will hereafter argue. In any event, while the evidence shows the Copper River & Northwestern Railway Company was a common carrier by railway in Alaska, it also shows that the Katalla Company was not such common carrier, but was merely a construction company.

Several months prior to plaintiff's accident a portion of the tunnel had caved in. Two and a half or three months prior to his accident, plaintiff went to work as foreman getting out the dirt from this cave-in (R., pp. 28, 60); he then spent seven or eight days in the woods cutting timber for the tunnel (R., p. 29), and then he went to work as a carpenter helping to re-timber the tunnel and fill in behind and above the walls and roof of the tunnel with wood and pieces of timber (R., pp. 61-63). He continued at this work for three weeks or a month before he was injured (R., pp. 26, 61).

The tunnel extended practically east and west. The east end being toward the Kennecott Mine and the west end toward Chitina and Cordova. The work of re-timbering the tunnel was commenced at the east end (R., p. 63), and new timbers were put in for a distance of about 200 feet (R., p. 163), and the work was stopped from six to twelve feet from a few old timbers which were left standing at the west end of the tunnel (R., pp. 63, 164). This

re-timbering was two stories high (R., pp. 30, 63, 163), and across the top of the first story and about 20 or 21 feet above the railway tracks a floor was placed covering the entire width of the tunnel and the entire length of the new timbering, making this floor about 24 feet wide by 200 feet long. Plaintiff had assisted in all of this re-timbering of the tunnel (R., p. 63), and knew that the west end had not been completed (R., pp. 38, 39, 65-68, 73), and that the floor stopped some 6 to 12 feet from the old timbers at this end, leaving an open space down to the track 20 or 21 feet below, through which material was being hoisted up on to the platform where he was working, for filling in holes in the floor between the timbers and for lagging the tunnel (R., pp. 64-67, 141, 166).

At the time of plaintiff's accident, he and three other carpenters were working on this platform. One of these carpenters was taking measurements of holes in the platform between some of the timbers, which had not been filled up, and the other two of these men were sawing timbers to be placed in these holes (R., pp. 33-35, 43, 100, 127, 132, 133). Plaintiff was taking the timbers when sawed and filling in the holes they were intended for. A hole had been left in the platform some 50 feet east from where these timbers were being sawed, through which these men reached the platform by means of a ladder (R., pp. 42, 96, 102, 121, 128). Just prior to his accident, plaintiff was informed by the man who was taking the



measurements of the holes to be filled in, that he had measured a hole between the point where the timbers were being sawed and plaintiff then was, and the Chitina end of the tunnel where plaintiff fell, and suggested that plaintiff go back and put the timbers in this hole (R., p. 43). This man was not a foreman, nor was there any foreman on this work at this time (R., p. 38). Just before this statement was made to plaintiff, a train had gone through the tunnel, sending up large quantities of smoke and gas into the chamber of the tunnel where plaintiff was working, making it difficult for the men to see to work. Trains had been running through the tunnel several times a week, sending up more or less smoke and gas all the time plaintiff had been working on this platform (R., pp. 35, 79, 120).

When plaintiff first went to work on the platform there were a couple of carbide lights and some gasoline torches used for lighting the platform. Some time before the day of the accident, the carbide lights had been taken away for use at another place; and then the gasoline torches and hand lanterns were used to furnish light on the platform. A few days before the accident all available gasoline was exhausted. The railroad being blocked between Chitina and Cordova, no other gasoline could be obtained, and for several days the only lights the men working on this platform had were three hand lanterns (R., pp. 33, 100, 127). The two men who were sawing

timbers used one of these lanterns where they were working, the man who was taking the measurements used one of the lanterns, and plaintiff used the other lantern (R., pp. 44, 105, 109).

Some time prior to the accident, plaintiff and the other men working with him on this platform had been directed by Mr. Forrester, engineer in charge of this work, to go down outside the tunnel when a train went through and do work there until the tunnel was clear of smoke (R., pp. 36, 78, 104, 131, 143). Afterwards when these men had no work to do outside the tunnel, it was their practice when a train went through and threw up so much smoke that it was difficult for them to see to work, to stop work and either stand still or go over to the ladder leading to the lower part of the tunnel and go part way down that, and wait until the tunnel was free of smoke (R., pp. 36, 78, 118, 121). Sometimes when the men were wet from handling the timbers, and they did not care to go outside the tunnel or down below where it was colder, they would merely stand still and wait until the smoke had cleared out. They had no instructions to continue work while the tunnel was full of smoke, and, except as they had been instructed on previous occasions to go outside and do work which they had to do there, they used their own discretion as to what they would do, depending upon how much smoke was thrown up from the passing engine, and whether they preferred to go

down where it was colder or remain still where they were. This was their practice even when they had the carbide lights and gasoline torches. At the time in question, the engine, as was customary, whistled and rang its bell before entering the east end of the tunnel, several hundred feet from where plaintiff was working, and then proceeded very slowly through the tunnel (R., pp. 44, 80, 81, 122, 141). At this time it threw out considerable smoke and gas. This smoke and gas were coming up through the platform on which plaintiff was working at the time he was told that the timber was ready to be placed in the hole between himself and the Chitina end of the tunnel. Instead of either going down the ladder or standing where he was, until the smoke had cleared out of the tunnel so he could see where to go with the lantern, which was the only light he had, he started to walk toward the unfinished end of the tunnel to find the hole where this timber was to be placed (R., p. 44). He walked between two rows of timbers about four feet apart, carrying the lantern in his left hand and feeling his way along. The end of the platform toward which he was going was about 50 feet from where he started (R., pp. 42, 43, 96, 102). The hole he was going to find was half way between these two points (R., p. 82). He knew that there was no guard or rail at this end of the floor of platform, nor any light there, nor had he ever asked that a guard or rail or light be placed there nor complained of their absence, but ad-

mitted it would have been his duty to place the lantern there if one was necessary (R., pp.68-69). He had not placed any guard or rail across this end of the platform, although there was plenty of material with which to make such a guard or rail, if it was necessary (R., pp. 116, 125). For some reason, either because of the effect of the smoke and gas on him, or because he was careless, he walked past the hole he was looking for and stepped off the end of the platform falling to the track below, receiving the injuries of which he complains.

The negligence complained of is that defendant neglected to place a guard across this end of the platform, or to place a light there to show the men working on the platform where the edge of the floor was. He did not testify, as alleged in his complaint, that he was going toward this end of the tunnel to get out of the smoke and gas, and the evidence shows that there was no occasion for his going near this end of the tunnel, as the work he had to do at this time did not necessarily take him near this edge. While there is some evidence of other holes in the platform which had not been filled up, plaintiff did not fall through any of these other holes, and it was his duty to fill these holes up.

While no mention of the Federal Employers' Liability Act is made in the complaint, the allegations therein and evidence introduced by plaintiff were clearly intended to make a case under that Act. Plaintiff alleges

that the defendant, Copper River & Northwestern Company is a corporation, "owning and operating a line of railroad from Cordova, on the Gulf of Alaska, to and beyond the Copper River, directly east of the town of Chitina, all in the Territory of Alaska, and was such corporation at all times hereinafter mentioned." And plaintiff introduced evidence to show that defendant, Copper River & Northwestern Railway Company, for some time prior to plaintiff's accident, had been engaged in the business of a common carrier, carrying freight and passengers from Cordova to a point on the railway line beyond the tunnel in question; that it had obtained a license under the laws of Alaska, authorizing it to transact such business as a common carrier by railroad in Alaska (R., pp. 145-147, 150-155).

These allegations and this evidence were clearly for the purpose of showing that the Copper River & Northwestern Railway Company was a "common carrier by railroad" in Alaska, within Section 2 of the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act. On the other hand, there is no allegation in the complaint, and no evidence was introduced that the Katalla Company was such common carrier. In fact, the allegations of the complaint are that the Katalla Company was a mere agency of the Copper River & Northwestern Railway Company, for the purpose of doing a portion of its business, and the evidence goes no further



in any event, than to show that the Katalla Company was a mere construction company and making the repairs in question as such.

But we shall argue that it makes no difference whether or not the action was intended to be based upon the Federal Employers' Liability Act; that if the evidence shows that this Act would apply, then its provisions alone would govern the rights of plaintiff in this action.

At the close of plaintiff's evidence, each defendant moved the court for a non-suit in its favor, for the reasons that the action was based on the Act of 1908, and plaintiff had failed to establish that both defendants were doing a common carrier business, which fact it was necessary for him to establish because the Act takes away the common law liability, and actions under the statute and common law could not be joined; also because, plaintiff had failed to establish that he was employed by or working for either defendant, and that he knew the condition of the place where he fell, knew the tunnel was full of smoke and walked into the hole through the smoke, while the other employees working with him stood still, according to instructions given them (R., pp. 157-160). These motions were denied and exceptions duly taken and allowed (R., p. 156).

At the close of all the evidence, each defendant moved the court for a directed verdict in its favor, upon the grounds urged in the motions for non-suit, which mo-

tions were denied and exceptions duly taken and allowed (R., pp. 170, 174).

Thereupon, the court instructed the jury as to the law of the case. It first instructed them as to the "law applicable to the case, in the absence of special statutory provisions, which apply only to railroads as common carriers in Alaska" (R., p. 175). Later the court instructed the jury as to "the law as it exists on the same subject matter, when a defendant employer is a railroad common carrier, and an employee is injured while engaged as a servant in the service of such common carrier" (R., p. 175).

The court in these instructions did not tell the jury which rule of law would apply in this case, but did instruct them that

"Before you can find either of the defendants a common carrier under the statutory provisions of Congress referred to as the Acts of 1906 and 1908, you must be convinced by the evidence that one or both was offering or holding itself or themselves out to carry goods and passengers for the general public when offered and tendered them and the price for so doing." (R., p. 180.)

Defendants requested the court to give the jury cer-

tain instructions, most of which requests were refused (R., pp. 186-194), to which refusal defendants excepted, and their exceptions were allowed (R., pp. 199-206).

After the verdict, defendants made a motion for a new trial for the following reasons:

I.

That the damages allowed by the jury were excessive and were given under the influence of passion and prejudice.

II.

That there was insufficiency of evidence to justify the verdict and that the same is against the law.

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III.

Error in law occurring at the trial and excepted to by the party making the application.

IV.

For the reason that the plaintiff based this action on the Acts of 1906, 1908 and 1910, commonly known as the Employers' Liability Act regarding common carriers, that there was no evidence introduced in the case sufficient for the jury to find both the Copper River & Northwestern Railway Company and the Katalla Company were each or both doing a common carrier business, and that the verdict in this case was rendered against both the Copper River & Northwestern Railway and the Katalla Company, and that the evidence failed to show

that either of said defendants were connected in any way with each other in doing a common carrier or other business.

## V.

For the further reason that the Court instructed the jury both under the common-law liability and the liability under the Acts of 1906, 1908 and 1910, commonly known as the Employers' Liability Act regarding common carriers; that the two remedies are separate and distinct, and that the plaintiff suing under the aforesaid Acts cannot recover under the common-law liability.

## VI.

For the further reason that the plaintiff admitted that he was working for the Katalla Company on a platform that was without a guard-rail; that he knew at the time and for several days prior thereto that said platform did not have a guard rail on it, and knew the exact position and condition of the point or place where he claims he was injured and by which *he injured*; that the evidence further showed that he with three other co-workers working with him, no foreman being present, were performing work on the scaffold or platform, and that the plaintiff himself had at prior times, when trains were passing through the tunnel, gone down from this platform in order to avoid smoke from the trains, and on this

particular day and time this plaintiff, knowing that the tunnel was full of smoke, claims to have started from the place where he was standing to walk toward the end of the tunnel where he was injured for the purpose of putting down some braces; that the plaintiff admitted that the smoke was so thick that he was unable to see the floor and that he was walking to this point to put some braces on the floor; that all of the other men working with him admitted that they stood still at this time, they also admitted that they could not see and had received instructions before that when trains passed through the tunnel and the smoke ascended that they should remain still; that the plaintiff knowing the condition of the tunnel and knowing that it was impossible for him to perform the work which he claims he started to do, attempted to walk through the smoke and walked off the point or place where he claims there was no guard-rail, although he admits that he knew there was no guard-rail at this point at that time for several days prior thereto, and admits that there was sufficient lumber convenient which he could have used to put on a guard-rail.

The motion for a new trial was denied, to which ruling defendants excepted and their *exceptions* were allowed (R., p. 198).

The questions involved in this statement of facts and presented here by the Assignments of Error, together



with the manner in which these questions are raised upon the record, are as follows:

### I.

Plaintiffs in error contend that it was the duty of the trial court to decide as a matter of law, whether this action was based upon a common law liability or upon a liability under the Federal Employers' Liability Act, and instruct the jury accordingly; that under the pleadings and evidence it appeared conclusively, that the defendant, Copper River & Northwestern Railway Company, was a common carrier by railroad in a Territory at the time of plaintiff's injury, within the terms of said Act, and therefore that plaintiff could only maintain this action against the Copper River Railway Company under this Act, after proving that he was injured while in that Company's employ; that under the pleadings and evidence it conclusively appeared that the defendant, Katalla Company, was not a common carrier by railroad at the time of plaintiff's injuries, within the terms of the Federal Act, and therefore, plaintiff could not maintain this action against the Katalla Company under that Act, but could only maintain this action against that Company under the common law; that plaintiff could not maintain this action against the defendants jointly, basing his right to recover against one defendant upon the statute, and against the other defendant upon the common law, nor

could he sue the defendants jointly, relying on both the common law and the statute, nor could the action be maintained under the pleadings and evidence against the defendants jointly, relying upon either the statute alone or the common law alone; that the joint judgment against the defendants cannot stand, under the pleadings and evidence in the case, and that the court erred in instructing the jury as to the rules of law applicable to an action based upon the common law, and also to an action based upon the statute, at least, without instructing the jury which rule applied in this case, or to which defendant the respective rules applied.

These questions are raised upon the record by the following Assignments of Error: IX, X, XXI, XXIII, XXVIII, XXXIV, XXXVII.

## II.

Plaintiffs in error contend that even if their foregoing position is not correct, and that this action could be maintained against both defendants, then that the evidence wholly fails to show any cause of action or right to recover against either defendant, for the following reasons:

(a) No right to recover against the Copper River & Northwestern Railway Company is shown because

1. Plaintiff did not show he was in the employ of this Company.

2. Plaintiff could only maintain the action against this Company under the Federal Act.

3. The evidence fails to show any negligence on the part of this Company, either under the common law or the statute.

4. If the action is based on the common law, the evidence shows as a matter of law, that plaintiff cannot recover because of his contributory negligence and assumption of the risks involved.

5. If the action is based on the statute, then the evidence shows, as a matter of law, that plaintiff assumed all the risks involved and he cannot recover.

(b) No right to recover against the Katalla Company is shown because

1. If plaintiff was in the employ of the Copper River & Northwestern Railway Company he was not also in the employ of the Katalla Company, and the latter Company was not his master, nor his fellow servant, nor liable to him upon any theory.

2. If plaintiff was in the employ of the Katalla Company, he could maintain this action against it only under the common law.

3. The evidence fails to show any negligence on the part of the Katalla Company, either under the common law or the statute.

4. If the action is based on the common law, the evidence shows, as a matter of law, that plaintiff cannot recover because of his contributory negligence and assumption of the risks involved.

5. If the action is based on the statute, then the evidence shows, as a matter of law, that plaintiff assumed all the risks involved and he cannot recover.

These questions are raised on the record by the following Assignments of Error: IX, X, XXIII, XXVIII, XXXVI, XXXVII.

### III.

Plaintiffs in error contend that even if they are incorrect in all of their foregoing contentions, and the action could be maintained against both Companies under the pleadings and evidence in the case, nevertheless, the court committed numerous errors in the trial of the case in giving an drefusing to give instructions to the jury, which errors were highly prejudicial to both defendants, and because of which the judgment of the trial court should be reversed and a new trial granted.

These questions are raised upon the record by the following Assignments of Error: XII, XIII, XIV, XV, XVII, XVIII, XXII, XXIV, XXV, XXVI, XXIX, XXX, XXXI, XXXII, XXXIII, XXXIV, XXXV, XXXVI, XXXVII.

## SPECIFICATION OF ERRORS RELIED UPON.

## IX.

The Court erred in denying the Motion of the plaintiff in error made after the defendant in error rested his case, for a nonsuit of said action, which motion was as follows as to both defendants:

## I.

“That this action is based on the Act of 1908, commonly known as the Employers’ Liability Act, and the plaintiff has failed to establish that both defendants were doing a common carrier business. That in order for plaintiff to prevail in this action, having based his cause of action upon the aforesaid Act, it is necessary that he establish that both the Copper River & Northwestern Railway Company and Katalla Company were doing a common carrier business for the reason that the aforesaid Act takes away the common law liability and that they are separate and distinct laws which cannot be joined.”

## II.

“That the plaintiff has failed to establish that he was employed by or working for the Katalla Company at the time he received his injuries.”

## III.

“That the plaintiff has admitted that he was familiar with and knew the condition of the place where he stepped from and was injured. Has admitted that at the time he was injured the tunnel was



full of smoke, the train had passed the point where he was standing and he walked into the smoke ahead of him and that all of the other employees working with him stood still according to instructions given them by the foreman."

#### IV.

"For the further reason that the plaintiff has failed to make out a case against these defendants."

#### X.

The Court erred in denying the motion of the plaintiff in error made at the close of the case for a Directed Verdict on behalf of both defendants to which defendants excepted and exception was allowed, which Motion was same as to both defendants and was as follows:

#### I.

"That this action is based on the Act of 1908, commonly known as the Employers' Liability Act, and the plaintiff has failed to establish that both defendants were doing a common carrier business. That in order for plaintiff to prevail in this action, having based his cause of action upon the aforesaid Act, it is necessary that he establish that both the Copper River & Northwestern Railway Company and Katalla Company were doing a common carrier business, for the reason that the aforesaid Act takes away the common-law liability and that they are separate and distinct laws which cannot be joined."

#### II.

"That the plaintiff has failed to establish that he was employed by or working for the Katalla Company at the time he received his injuries."

## III.

“That the plaintiff has admitted that he was familiar with and knew the condition of the place where he stepped from and was injured. Has admitted that at the time he was injured the tunnel was full of smoke, the train had passed the point where he was standing and he walked into the smoke ahead of him and that all of the other employees working with him stood still according to instructions given them by the foreman.”

## IV.

“For the further reason that the plaintiff has failed to make out a case against this defendant.”

## XI.

The Court erred in giving the following instruction to which plaintiffs in error duly excepted and its exception was allowed:

“I will first proceed to give you the law applicable to the case, in the absence of special statutory provisions which apply only to railroads as common carriers in Alaska, and later give you the law as it exists on the same subject matter, when a defendant employer is a railroad common carrier, and an employee is injured while engaged as a servant in the service of such common carrier.”

## XII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed.

“You are instructed that the rule of law is that between master and servant the master is liable for all accidents occurring in the course of the employment which are not induced by the carelessness or improper conduct of the employee or servant.”

### XIII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed.

“In other words, the master is bound to use reasonable care and diligence to prevent accident or injury and if he does not he will be responsible for the damages, unless the servant assumed the risk or contributed to the injury through his own negligence, or the negligence of a fellow-servant.”

### XIV.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed.

“As between master and servant negligence should be measured by the character and risk of the business engaged in and the degree of care of both master and servant is higher when the lives and limbs are endangered than in ordinary cases.”

### XV.

The Court erred in giving the following instruction,

to which plaintiffs in error duly excepted and its exception was allowed.

“All acts and duties which the master is bound to perform toward his employees and servants, which he delegated the performance of to others as an agent, then the agent occupies the same place as the master and the master is deemed present and liable for the manner in which such duties are performed.”

### XVII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed.

“You are instructed that the servant does not assume the extraordinary or unusual risks of the employment but on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knew of or may have known in the exercise of reasonable care, except that he does not assume such risks as are created by the master’s negligence.”

### XVIII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed.

“Where the negligence or want of ordinary care and caution of a servant so far contributed to his injury that it would not have occurred but for such

negligence, he cannot as a rule recover. But if the injury is caused by the gross or wilful negligence of the master or his agents, or if the consequences of the servant's negligence might have been avoided by the exercise of ordinary and reasonable care on the part of the master or his agents, then the servant could recover though himself negligent."

### XIX.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed.

"All servants engaged in the same common work, without any dependence upon or relation to each other, except as co-laborers without rank, under the direction and management of the master, or his agents, are fellow-servants."

### XX.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed.

"To render the master not liable for an injury to a servant caused by the negligence of a fellow-servant, it must be shown that the injury directly resulted by reason of such fellow-servant's negligence, that is, that it was the proximate cause thereof and not the negligence of the master."



## XXI. --

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed.

“That every common carrier engaged in commerce in the Territories \* \* \* shall be liable in damages to any person suffering injury while he is so employed by such carrier in any of said territories, for such injury \* \* \* resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track roadbed, works, boats, wharves or other equipment.”

“That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act, to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.”

## XXII.

The Court erred in giving the following instruction, to which plaintiffs in error duly excepted and its exception was allowed.

“This is your last case at this term of court, of which you have had several on the same general subject of personal injured.”

## XXIII.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

“You are instructed that the defendants, Copper River & Northwetsern Railway Company and the Katalla Company have plead separately in this action and in order for you to find a verdict against either of the defendants, Copper River & Northwestern Railway Company and the Katalla Company, you must first find from the evidence that the plaintiff was working for either the Katalla Company or the Copper River & Northwestern Railway Company or both and if the evidence fails to show that the plaintiff was working for the Katalla Company, then you are instructed that the plaintiff cannot recover against the Katalla Company and you are futrher instructed that if the plaintiff fails to show from the evidence that he was working for the Copper River & Northwestern Railway Company, then you are instructed that he cannot recover against the Copper River & Northwestern Railway Company.”

## XXIV.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

“You are instructed that if you find from the

evidence that the plaintiff had been warned that when trains were passing through the tunnel that he should quit work and either come down from the roof of the tunnel or not move around and he failed or refused to obey said orders and he would not have been injured if he had obeyed said orders and he was injured by refusing to obey said order, then you are instructed that the plaintiff cannot recover in this action.”

## XXVI.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

“You are instructed that the plaintiff is presumed to know the dangers that he has an opportunity to observe and that he must inform himself of open, obvious risks and if he does not do this and is injured by reason of his failure to do so, then he cannot recover.”

## XXVII.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

“You are instructed that if the plaintiff continued working with knowledge actual or constructive of dangers which an ordinary prudent man

would refuse *or* subject himself to, he is guilty of contributory negligence and cannot recover.”

## XXVIII.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

“You are instructed that if you find that the Katalla Company was not doing a common carrier business at the time that the plaintiff was injured, and doing a common carrier business over that portion of the railroad line upon which the plaintiff was working and at the place where he was injured, you are instructed that the plaintiff cannot recover in this action.”

## XXIX.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

“You are instructed that plaintiff has admitted in this case that he was working as a carpenter at the time of his injury and that he was familiar with and knew that at the place where he fell over had no guard-rail across it, which fact was known to him for several days prior to the accident and at the time of the accident, therefore you are instructed that if the plaintiff continued working with knowledge of these facts as he has testified that he did have and if

you further find that he knew or ought to have known as a reasonable prudent man that it was dangerous not to have a guard-rail at this place and no one in authority had promised to have a guard-rail or other protection at this place, then you are instructed the plaintiff assumed the risks incident to no guard-rail being at the point or place where he fell.”

### XXX.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

“You are instructed that plaintiff has admitted in this case that he was working as a carpenter at the time of his injury and that he was familiar with and knew that at the place where he fell over had no guard-rail across it, which fact was known to him for several days prior to the accident and at the time of the accident, therefore you are instructed that if the plaintiff continued working with knowledge of these facts as he has testified that he did have and if you further find that he knew or ought to have known as a reasonable prudent man that it was dangerous not to have a guard-rail at this place and no one in authority had promised to have a guard-rail or other protection at this place, then you are instructed that the plaintiff assumed the risks incident to no guard-rail being at the point or place where he fell and cannot recover in this case.”



## XXXI.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

“You are instructed that the palintiff has admitted that he knew at the time of his accident and for several days prior thereto that there was no guard-rail or other protection at the point or place where he fell, and has admitted that he knew that trains were running through this tunnel and that smoke from the engines surrounded the place where he was working, and that while he was surrounded by smoke from the engine he voluntarily continued working when he knew that he could not see where he was walking and that he did proceed and while walking stepped off of the point or place where he claims there was no guard-rail; therefore you are instructed that the plaintiff assumed the risks of walking or trying to work at that time.”

## XXXII.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

“You are instructed that the plaintiff has admitted that he knew at the time of his accident and for several days prior thereto that there was no guard-rail or other protection at the point or

place where he fell and has admitted that he knew that trains were running through this tunnel, and that smoke from the engine surrounded the place where he was working and that while he was surrounded by smoke from the engine he voluntarily continued working when he knew that he could not see where he was walking and that he did proceed and while walking stepped off of the point or place where he claims there was no guard-rail; therefore you are instructed that the plaintiff assumed the risk of walking or trying to work at that time, and he is guilty of contributory negligence."

### XXXIII.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

"You are instructed that the plaintiff has admitted that he knew at the time of his accident and for several days prior thereto that there was no guard-rail or other protection at the point or place where he fell and has admitted that he knew that trains were running through this tunnel and that smoke from the engines surrounded the place where he was working and that while he was surrounded by smoke from the engines he voluntarily continued working when he knew that he could not see where he was walking and that he did proceed and while walking stepped off of the point or place where he claims there was no guard-rail; therefore you are instructed that the plaintiff assumed the risks of

walking or trying to work at that time, and he cannot recover in this case."

#### XXXIV.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

"You are instructed that the plaintiff admitted that he was working while he claims the tunnel or place of work was not sufficiently lighted for several days. You are instructed that if the plaintiff knew this and continued at work, that the plaintiff assumed the risks incident to his employment by reason of the fact that the tunnel was not sufficiently lighted."

#### XXXV.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

"You are instructed that the plaintiff admitted that his general work was that of assisting in retimbering and strengthening the tunnel for the purpose of making same safe. You are therefore instructed that the plaintiff assumed all of the risks of employment in his work of retimbering and strengthening said tunnel."

## XXXVI.

The Court erred in refusing to give to jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed, which instruction was as follows:

“You are instructed that this case is based upon the Acts of 1906 and 1908 regarding common carriers. You are instructed that before the plaintiff can recover in this case he must prove by the preponderance of evidence that both of the defendants were common carriers and unless you so find, the plaintiff cannot recover in this action.”

The Court erred in denying the motion of defendants (plaintiffs in error) for a new trial herein, and its order and judgment overruling said motion and granting judgment in favor of plaintiff and against said defendants for the amount of the verdict found by the jury in favor of plaintiff with costs; which order and judgment were duly excepted to by the defendants and exception allowed by the Court. Said motion was based on all the files, records and proceedings herein and was made upon the following grounds specified therein and on each thereof, to-wit:

Comes now the defendant, Copper River & Northwestern Railway Company and Katalla Company, and moves the Court for a New Trial in this action for the following reasons:

## I.

“That the damages allowed by the jury were excessive and were given under influence of passion and prejudice.”

## II.

“That there was insufficiency of evidence to justify the Verdict and that the same is against the law.”

## III.

“Error in law occurring at the trial and excepted to by the party making the application.”

## IV.

“For the reason that the plaintiff based this action on the Acts of 1906, 1908 and 1910, commonly known as the Employers' Liability Act regarding common carriers, that there was no evidence introduced in this case sufficient for the jury to find that both the Copper River & Northwestern Railway Company and the Katalla Company were each *of* both doing a common carrier business, and that the verdict in this case was rendered against both the Copper River & Northwestern Railway Company and the Katalla Company, and that the evidence failed to show that either of said defendants were connected in any way with each other in doing a common carrier or other business.”



## V.

“For the further reason that the Court instructed the jury both under the common-law liability and the liability under the Acts of 1906, 1908 and 1910, commonly known as the Employers’ Liability Act, regarding common carriers; that the two remedies are separate and distinct and that the plaintiff suing under the aforesaid Acts cannot recover under the common law liability.”

## VI.

“For the further reason that the plaintiff admitted that he was working for the Katalla Company on a platform that was without a guard-rail; that he knew at the time and for several days prior thereto that said platform did not have a guard-rail on it and knew the exact position and condition of the point or place where he claims he was injured and by which he was injured; that the evidence further showed that he with three other coworkers working with him, no foreman being present, were performing work on the scaffold or platform and that the plaintiff himself had at prior times, when trains were passing through the tunnel, gone down from this platform in order to avoid smoke from the trains, and on this particular day and time this plaintiff knowing that the tunnel was full of smoke, claims to have started from the place where he was standing to walk toward the end of the tunnel where he was injured, for the pur-

pose of putting down some braces ;that the plaintiff admitted that the smoke was so thick that he was unable to see the floor and that he was walking to this point to put some braces on the floor, that all of the other men working with him admitted that they stood still at this time; they also admitted that they could not see and had received instructions before that when trains passed through the tunnel and the smoke ascended that they should remain still; that the plaintiff knowing the condition of the tunnel and knowing that it was impossible for him to perform the work which he claims he started to do, attempted to walk through the smoke and walked off the point or place where he claims there was no guard-rail, although he admits that he knew there was no guard-rail at this point at that time and for several days prior thereto and admits that there was sufficient lumber convenient which he could have used to put on a guard-rail."

## ARGUMENT.

### THIS JOINT ACTION CANNOT BE MAINTAINED.

We content that this action against the defendants jointly cannot be maintained. The action against these defendants must be based either upon the Federal Employers' Liability Act or common law. It cannot be maintained against either defendant based upon both the statute and common law. If the Act applies to either defendant, it "supersedes all other common law and statutory liability on the part of such common carriers to such employees,"

*De Aitley vs. C. & O. R. Co.*, 201 Fed. 591.

See also

*Kelly's Administrator vs. C. & O. R. Co., et al.*,  
201 Fed. 620;

*Michigan Central R. Co. vs. Freeland*, 45 Sup.  
Ct. Dec., February 15, 1913, page 192;

*Adam Express Co. vs. Croninger*, U. S. Sup. Ct.  
Dec., February 15, 1913, page 148;

*Winfree, etc. vs. N. P. R. Co.*, U. S. Sup. Ct. Dec.,  
March 15, 1913, page 273;

*Second Employers' Liability Cases*, 223 U. S. 1.

If the Act applies to one defendant and not to the other, then an action against one defendant based on the Federal Act could not be joined with an action against the other defendant based on a common law liability.

The case of *Kelly's Administrator vs. C. & O. R. Co., et al, supra*, was an action for damages for death, brought against the Railroad Company and its employee, who was alleged to have been negligent in the matters complained of. The court held that the action could be maintained against the Railroad Company only under the Federal statute, and against the individual defendant only under the common law, because it is "limited to common carriers engaged in interstate commerce, and he is not such," the court saying:

"What we have here, then, is two causes of action joined together in the same suit, one against the corporate defendant under the National Statute, and one against the individual defendant under the State Statute, and it may be accepted that they are improperly joined."

That this ruling is correct would seem to require no argument. It follows therefore, that in order to maintain this joint action, the liability of both defendants must be based either on the statute or on the common law, and cannot be based as to both defendants on both the statute and common law, or as to one defendant on the statute and as to the other defendant on the common law. It is, therefore, necessary to determine upon which ground each defendant is liable, if at all.

The complaint alleges that the Copper River & Northwestern Railway Company is a Nevada corporation,

“owning and operating a line of railroad from Cordova on the Gulf of Alaska, to and beyond the Copper River, directly east of the town of Chitina, all in the territory of Alaska, and was such corporation at all time hereinafter mentioned”; that the Railway Company “in operating such line of railroad” transacted part of its business through the Katalla Company, and that the Railway Company “is the real employer of men working on its said line in the operation and maintenance of the same” (R., pp. 2 and 3). Plaintiff introduced evidence showing that the Railway Company had operated the railroad for more than six months prior to the accident in question, as a common carrier of freight and passengers from Cordova to and beyond the place in question; also that the Railway Company had obtained a license under the laws of Alaska, for operating this railroad as such common carrier (R., pp. 145-147, 150-154). This evidence was not disputed, and we think it showed conclusively, for the purposes of this case, that the Copper River & Northwestern Railway Company was a common carrier by railroad in Alaska within Section 2 of the Act of 1908. While the evidence also showed that for some time prior to the accident to plaintiff, the road was not being operated between Cordova and Chitina because of a snow blockade, we do not think this sufficient to take the Company out from the statute during this time.



The evidence also showed without dispute that plaintiff was engaged in making repairs upon a tunnel used by the Railway Company in its business as such common carrier, and this we think, brings plaintiff within the terms of the statute, provided he was employed by the Copper River & Northwestern Railway Company. These two facts appearing without dispute, if the Railway Company is liable at all, it must be by virtue of the Federal Statute only.

Nor was it necessary for plaintiff to expressly allege and rely on the statute. If the facts alleged and proven show that the statute applied, then the rights and liabilities of the parties depend upon that statute, whether plaintiff relied upon the statute in his complaint or not.

"True, it is not distinctly alleged in the declaration that the action is based upon the Second Employers' Liability Act; but we think this effect must be given to the averments of the declaration that deceased met his death while in the employ of the company and while it was engaged in interstate commerce. Such averments rendered the Federal act alone applicable, and, further, the case was tried and disposed of below upon that theory."

*Garrow v. L. & N. R. Co.*, 197 Fed. 715.

See also:

*Smith vs. D. & F. & L. R. Co.*, 175 Fed. 560;

*Conrad vs. A. T. & S. P. R. Co.*, 153 Fed. 511;

*Rice R. Co. vs. White*, 187 Fed. 256.

*McGowan vs. Illinois Central R. Co.*, 207 Ill. 85.

*Kelly's Administrators vs. C. & N. R. Co.*, supra.

On the other hand, the complaint alleged that the Kankakee Company "operates engines and draws many of the cars working on and around line," and "is a mere agent of said Copper River & Northwestern Railway Company, and the operations of said Kankakee Company are in reality operations of the Copper River & Northwestern Railway Company, and the Copper River & Northwestern Railway Company is the real employer of men working on it and line is the operation and maintenance of the same." Also that plaintiff at the time of his injury was "in the actual employ and under the actual direction of said Kankakee Company, agent of said Railway Company as aforesaid."

No evidence was offered tending to show that the Kankakee Company was organized to conduct its business as a common carrier for Railway, at least for some months prior to the accident in question, while the evidence did show that the Articles of Incorporation of the Kankakee Company provided it to be acting as such common carrier (Ill. v. I.C.). The evidence offered as to the character of the railway line was that the Copper River & Northwestern Railway Company owned and operated the line, while the Kankakee Company was a pure construction company and, at least, as agent for the Railway Company, is al-

leged in the complaint (R., pp. 145-147, 150-154). To state a cause of action against the Katalla Company under the Federal Statute, it was necessary for plaintiff to prove that this Company was a common carrier by railroad in Alaska, which he neither alleged nor attempted to prove, but expressly alleged and proved that it was not. Therefore, under the very terms of the statute and all the decisions thereunder, no recovery could be had in this action against the Katalla Company under the Federal Statute. It follows that this joint action could not be maintained, and as objection was at all times made on this ground, the joint judgment cannot be sustained.

The Act "is in derogation of the common law and must be strictly construed."

*Fulghan vs. Midland Valley Co.*, 167 Fed. 660;

*Johnson vs. S. P. R. Co.*, 196 U. S. 1.

The Act is available only when two facts appear: First, the offending carrier must at the time of injury be "engaged in commerce between any of the several states, etc."; and, Second, the injury must be suffered by an employee "while he is employed by such carrier in such commerce." Both these facts must be present or the Act does not apply—the carrier must be actually engaged in interstate commerce, and the employee must also be taking part therein.

*Pederson vs. D. L. & W. R. Co.*, 184 Fed. 739.

While this case was reversed by the Supreme Court of the United States, it was on other grounds, and the rule above stated was recognized as correct; the same rule has been recognized in all of the decisions arising under this Act.

It is apparent from the court's instructions that he considered all these questions as questions of fact to be decided by the jury, and accordingly he instructed them as to the rules of law applicable to the case in the absence of the Federal statute, and also the law applicable if the statute applied; but he did not tell the jury which rule of law would govern, nor even tell them that if they found the defendants, or either of them, to be common carriers by railroad, the law under the statute as given them, would apply, while if they did not find either or both defendants to be such carriers, then the common law rules would apply. Thus, the court instructed the jury on two entirely different theories of law, and left them to determine which should be followed, and how to apply that rule.

It is certainly unnecessary for us to cite authorities that it was the duty of the court to decide which rule of law applied in this case, and then tell the jury what that rule is, especially as the facts are undisputed. Even if it were permissible for the trial court to tell the jury what the rule at common law is, as a matter of mere informa-

tion, or to aid the jury in understanding the rule under the statute, still this should only be done when followed by express instructions that the common law rule was not applicable and that the jury must follow the rule under the statute. On the other hand, if the common law rule applied, then of course, it would be entirely improper to instruct them as to the rule under the statute.

It is certain that the jury in this case were given no instructions as to what rule of law to follow, but were left confused as to what the law of the case is, having a right to assume that the court itself did not know which rule to apply. The court's attention was sepcifically called to these matters repeatedly, by motions for nonsuit, for directed verdict, by objections to instructions, requests for instructions and a motion for a new trial, and it would seem to us too clear for argument that a verdict against the defendants, after such instructions, cannot stand.



NEITHER DEFENDANT IS LIABLE UNDER  
EITHER THEORY OF THE LAW.

Even if we are not correct in the foregoing position, nevertheless, we contend that the judgment is not sustained against either defendant by the evidence in this case. Before plaintiff could recover against either defendant, he was obliged to prove that he was in the employ of that defendant. The complaint alleges that plaintiff was in the "nominal" employ of the Katalla Company as *agent* for the Railway Company, which was his *real* employer. He introduced evidence in an attempt to prove these allegations. Plaintiff testified that he was paid by the Katalla Company (R., pp. 30, 55), and that he was working under Engineer Forrester, who worked for the Katalla Company (R., pp. 55, 146). The other men working with plaintiff did not know which Company they were working for. They merely knew that they were working on the railway line (R., pp. 114, 126, 134, 135). This evidence does not even tend to prove that plaintiff was in the nominal employ of the Katalla Company. It certainly is not enough to prove that plaintiff was in the employ of the Copper River & Northwestern Railway Company, or if it shows this fact, then it also shows that he was not in the employ of the Katalla Company. It cannot be said from this evidence that plaintiff

was in the employ of both companies, and that both owed him a duty as his master.

But if plaintiff was in the employ of the Railway Company, then he could recover against that Company only under the Federal statute, as we have before shown; while if he was in the employ of the Katalla Company, he could recover against that Company only under the common law. However, we do not think he could recover against either company, no matter which one employed him, and owed him a duty as master.

In the first place, we do not think it could be seriously contended that plaintiff could recover against either Company under the common law. His master, whether one Company or the other, owed him a duty to use reasonable care and precaution to provide a reasonably safe place in which to perform his work. This was not an absolute duty, because a master is not an insurer on that score, but is required to exercise reasonable care and forethought to provide such a place as is reasonably safe for the servant's work. Where the master has done this, he has discharged his duty to his employee and is not guilty of any negligence in that regard.

*Pacific T. & T. Co. vs. Starr*, 206 Fed. 157, 162.

In this case plaintiff was working upon a floor or platform about 24 feet wide and 200 feet long. While there were a few small holes in this platform which had

not yet been filled, and which it was plaintiff's duty to fill, nevertheless, he did not fall in any of these holes, and there were no defects in the platform. The re-timbering of the tunnel was commenced at the east end, being the end farthest from the place plaintiff fell, and the work of re-timbering, and flooring over the top of the tunnel was carried on toward the west end. This work was completed at the east end and the end of the floor filled up (R., p. 163.) It fact, it appears that most of the work of re-timbering and lagging the tunnel was completed. A few of the old bents of the tunnel, which had not caved in, were still standing at the west end, occupying a space of some 20 to 30 feet from that portal of the tunnel.

When the new timbering and platform reached this point, it was stopped some six feet from these old bents, and this opening of from six to twelve feet clear across the tunnel was left for the purpose of raising timbers, lagging, etc., up on to this platform, to be used in completing the work above (R., pp. 64-67, 141, 166). Plaintiff had been engaged in assisting in all of this work for nearly a month. He says he assisted generally in the work of re-timbering the tunnel. While he did not personally put up these last new bents, or lay this last new floor, nevertheless, he was working in and about this tunnel during all of this time and knew exactly its condition and the purpose for which it was left in that condition (R., pp. 38, 39, 65-68, 73). No guard-rail was

placed across this end of the platform or floor in the tunnel, which fact plaintiff also knew. He now complains that the failure to place this guard or rail across this end of the tunnel was negligence on the part of his employer, because it rendered the place where he was working unsafe. We think the court will say, as a matter of law, that there was no negligence on the part of either defendant in not placing a guard or rail across this end of the platform. As well might a carpenter working on a flat roof complain that no guard or rail was placed around the edge of the roof. In fact, there would be more reason to require a guard or rail around a small roof near the edges of which the carpenters on the roof would be obliged to work, than to require a guard or rail across the end of this platform 200 feet long by 24 feet wide, and near which plaintiff was not required to be in performing any of his work.

The rule requiring a safe place for an employee to do his work in does not require the employer to make every place about his premises near which an employee has no occasion to go, or be in the performance of his work, so safe and secure that the employee cannot be injured if he goes where he ought not and need not go. It only requires the places near which the employee is required to be while in the performance of his work, or the places near which he is obliged to go in coming to and going from his work, to be kept in a reasonably safe condition.

In this case, the place of entrance to and exit from this platform was not, and had not been at this end of the platform, but it was some 50 feet toward the other end from where plaintiff was working. The place where plaintiff and the other men on the platform were working was about 50 feet from this end of the tunnel, and the hole which plaintiff started to fill in was nowhere near this end of the tunnel. Plaintiff's employer had no reason to anticipate that any of the men on this platform would ever get near this end of the tunnel, unless it was when they went there to get material which was hoisted up from below to the platform at this point.

Furthermore, the evidence does not show that it was practicable to place a guard or rail across this end of the tunnel. This hole was left, as we have stated, so that material might be hoisted on to the platform at this point, and this could not be done if a guard or rail was placed across this end.

Again, the unguarded condition of this end of the platform was, for the time being, a permanent condition well known to plaintiff, and, in the absence of a statute requiring such an opening to be guarded, there was no negligence on the part of the master in not guarding the same, especially when it is left in this condition for the purpose of doing its work, and was not near the place where its employees are required to work, nor where they



are required to go in doing such work, and where such condition was well known to them.

In the case of *Anthony vs. Leeret et al*, 12 N. E. 561, (N. Y.), plaintiff was injured by falling through a trap-door, but the existence of which he well know. The Court of Appeals of New York in discussing the obligation of the master toward plaintiff with reference to this door says:

“The location of the trap-door in the passage-way was not *per se* a wrongful act. The defendants had a right to arrange their own premises in any way which suited their convenience, and were not bound to change the arrangement to secure greater safety to the employees. If the trap-door was not open to observation, or its existence was not known to those whose duty required them to use the passage-way, or if the defendants had omitted to give proper instructions to those employed in the planing-room, a different question would be presented.”

“It is true the master is under obligation to furnish a reasonably safe and convenient place for his servants to work in, and reasonably safe appliances for them to use in the performance of their work; but he is not an insurer against accidents, nor is he called upon so to construct every part of his premises as to prevent the possibility of accident thereon.”

*McCann vs. Atlantic Mills*, 40 Atl., p. 500  
(R. I.)

“There is no absolute duty on the part of an employer to box his machinery (Citing authorities).

And, under the circumstances of the case, there was no duty on the part of the employer to instruct the plaintiff that the coupling on the shaft was not boxed. The fact was obvious, and it must be assumed that he could see the condition of things. When the dangerous character of the machinery is in plain sight, a workman, ordinarily, must take notice, and no duty rests on the employer to point this out."

*Murphy vs. American Rubber Co.*, 34 N. E. 268 (Mass.).

"So far as risks are obvious, pertaining to the apparently permanent features of the business as it is openly conducted, an employer has a right to believe that his employee agrees to assume them. They are therefore not included among those to be guarded against in the performance of his general duty to furnish reasonably safe appointments for the employee, and the employer cannot be held guilty of negligence in failing to make provision against them."

*Murch vs. Thos. Wilson's Sons & Co.*, 74 N. E. 111 (Mass.)

"It is not negligence upon the part of the master to lay out a particular mode of doing his work, or to furnish therewith particular appliances for doing his work, where neither such mode nor such appliances are inherently or latently dangerous. When the employee knowing of such mode and of such appliances enters the service and continues in the service of his employer, he assumes the ordinary risks of such service arising from such mode which he knows by ordinary observation, and from such appliances, which are simple in their construction.

and not worn out, broken, or defective.”

*Ladwig vs. Jefferson Ice Co.*, 124 N. W. 407,  
410 (Wis.)

Under the evidence in this case we think it appears conclusively, as a matter of law, that neither defendant was negligent in not placing a guard or rail across the end of the platform from where plaintiff fell.

The other ground of negligence claimed is that defendants failed to furnish proper lights on this platform. The evidence shows that some time prior to the accident, carbide lights with reflectors were used, which would give very strong light upon the platform, except when trains went through and the smoke was dense, and at such times even the carbide lights would not light the platform to any great extent. (R., p. 131). It also appears that when these carbide lights were used the reflectors were turned so the lights were thrown away from this end of the platform (R., p. 101) and upon the part of the platform where the men were working. These lights therefore, never were intended to, nor did in fact, indicate this unguarded edge of the floor, and even if they had been on the platform at the time in question, and had been used as they were ordinarily used, they would not in any way have prevented the accident. It also appears that when the gasoline torches were used, they were not placed at this end of the platform, nor used for the purpose of showing where this edge was, but were

used where the men were working at their places along the tunnel. Even when they were used, they gave very little light when the tunnel was filled with smoke from passing engines, therefore, their absence did not in any way contribute to plaintiff's injury.

Plaintiff was furnished a hand lantern to use in doing his work, lanterns being the only lights furnished the men on the platform for several days prior to the accident. No complaint was made that they were not sufficient, and no request was ever made that any lantern or light be placed at the edge of the platform. These lanterns were certainly sufficient to show the edge of the platform, when carried by a person walking toward the edge, unless the smoke was too dense, and in that event, a light at the edge of the platform would have been no better than the one plaintiff carried. If this lantern was not sufficient to properly light the platform at this time, so as to make it safe for plaintiff to walk toward this unguarded end, then he should have followed the practice theretofore followed by the men working on the platform, of standing still and waiting until the smoke cleared out, instead of blindly groping along through the smoke to the edge he knew was open. It was certainly no negligence on the part of the defendants in not assuming that he might start to walk through the dense smoke toward this open end without a proper light, and be injured, so that they were negligent in not guarding against such an act. We

think that under the well settled rules of law and the undisputed evidence in this case, no negligence against the defendants can be predicated on their failure to furnish other light than the lanterns which were furnished.

It is alleged in the complaint that the defendants "willfully, negligently and wrongfully" ran the engine through the tunnel while plaintiff was working. But there is no testimony to sustain this allegation. The engine was not run through the tunnel "willfully," and it ran through in the same way it had been running through several times a week during all the time plaintiff was working on the platform. Before entering the tunnel it whistled and rang the bell to warn the persons working there it was coming, and then proceeded through at about six miles an hour, so slowly that the witness Likits, who was standing on the bottom of the tunnel just about this opening, had time to walk to the end of the tunnel and back again after hearing the engine whistle, and before it reached him (R., pp. 138, 139, 142). This witness was at this time sending up timbers and lumber on to the platform above, at the opening where plaintiff fell (R., p. 141). While it is true the engine at this time threw out considerable smoke, there is no evidence that it threw out more than it did on numerous other occasions, and no claim of negligence in the running of the engine through



the tunnel, or the way it which it was run through can be made in this case.

But even if there is sufficient evidence in the case to go to the jury on the question of the negligence of either defendant, still we do not think it can be contended that under the common law plaintiff could recover under the evidence in this case, because he assumed all the risks of injury from falling off this open end, the unguarded and unlighted condition of which had been well known to him for a long time, and also because of his own negligence in walking toward that end through the dense smoke, with only the hand lantern which had been furnished him. The evidence shows that the other workmen on the platform had been told by Mr. Forrester, who had charge of the work, to either go down outside the tunnel and work, when the tunnel was filled with smoke from passing engines, or if they did not have work outside, to go down the ladder to the open tunnel below, or stand still where they were and wait until the smoke cleared out. Plaintiff admitted knowing these instructions (R., p. 78), and he admitted that it had been the practice of the men working on the platform to either go down the ladder and wait until the smoke cleared out, or if they were wet and it was cold below, to stand still until they could see to work (R., pp. 36, 78). He did not have any instructions to continue work while the tunnel was filled with smoke, and if he saw fit to do so and walked

toward this open end of the platform, knowing its condition as well or better than the defendants knew it, then certainly at common law he assumed all the risks of doing so, and his negligence was the proximate cause of his injury.

“The injured servant cannot maintain an action unless he shows that the defect alleged was the proximate cause of his injury. Thus, he cannot recover \* \* \* if the defect in question would not have caused any injury, if he had not himself been guilty of negligence in dealing with the defective appliance.”

*Labbatt's Master & Servant*, 2nd Ed., Vol. 5, Sec. 1670.

“There exists an exception to the general rule that an employee may assume that reasonable care will be observed by his employer for his protection, which is that where a defect in machinery is known to an employee or is so patent and obvious as to be readily observable while engaged in his work, and he continues in the use and operation thereof notwithstanding the defect, he assumes the risk and hazard attending such use. The reason for the exception is that having such knowledge or possessed of the ready means of acquiring it and shutting his eyes to palpable conditions, he elects to engage in the service, and therefore to undergo the hazard on his own account.”

*Katalla Company vs. Rones*, 186 Fed. 30.

“At common law a servant assumes the general risks of his employment, but he is not obliged to pass

upon the methods chosen by his employer in discharging the latter's duty to provide suitable appliances and a safe place to work, and he does not assume the risk of the employer's negligence in performing such duty. This rule is subject to the exception, that, where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective appliance, in the face of knowledge and without objection, without himself assuming the hazard incident to such situation. If a defect is so plainly observable that the servant may be presumed to know its existence, and he continues in the master's employment, without objection, he is said to have made his election to thus continue, notwithstanding the master's neglect, and in such a case he cannot recover."

*Texas & R. R. Co. vs. Harvey*, U. S. Sup. Ct.  
Dec., May 15, 1913, page 5518.

"The workman assumes those risks of danger which are ordinarily incident to the work in which he is engaged, and those which are open and obvious to the senses, and which are known to him, if he continues in the occupation."

*Pacific T. & T. Co. vs. Starr, supra.*

The case of *Faber vs. C. Reiss Coal Company*, 102 N. W. 1049, decided by the Supreme Court of Wisconsin, is peculiarly in point. There the plaintiff was injured by falling off a platform upon which he was working, and the grounds of negligence charged were the failure of the employer to furnish a guard or rail on this platform, or sufficiently light it. The case is not as strong in favor

of the employer as is the case at bar, for the reason that the platform was narrow, and plaintiff had only been working on it an hour or so before he fell. However, it appeared that he knew the exact condition of the platform, and he fell off the edge while walking across the platform to get a drink. The case was submitted to the jury, and special findings were made to the effect that defendant was guilty of a want of ordinary care and prudence in failing to properly light the premises, and in failing to erect a barrier or railing at the point where plaintiff fell, and that this negligence was the proximate cause of plaintiff's injuries. The jury also found that plaintiff's injuries were not occasioned by an accident not occurring by reason of the negligence of either party, that the platform was not a reasonably safe place for plaintiff to perform his work, and that there was no want of ordinary care on the part of plaintiff which contributed to his injuries. Judgment was rendered in favor of plaintiff on this verdict, but the same was reversed and a new trial granted upon the ground that plaintiff assumed the risks of working upon this platform, which were obvious to him. We would respectfully call the court's attention to the discussion of the law on this question by the court in this case.

The case of *Byers vs. Youghiogheny & Ohio Coal Co.*, 79 Atlantic, 157, was an action for personal injuries by an employee, sustained from a fall from an unguarded

platform or stairway in the place where plaintiff was required to work. The lower court granted a non-suit upon plaintiff's evidence, and the Supreme Court of Pennsylvania, after discussing the evidence said:

“No argument is needed to show that he assumed the risk of his employment,”

and affirmed the lower court.

“Plaintiff knew the very danger that he complains of as constituting the negligence of defendant, and it must be held as a matter of law that he assumed the risk.”

*Elmer vs. Mutual Steamship Co.*, 130 N. W. 1104 (Minn.):

An employee assumes the risk incident to openings in the floor of the room in which he is at work, which are so obvious as to be easily seen by any one working in the room. “He assumed by his contract any risk attendant upon their forming a part of the works of his employer.”

*Connolly vs. Furbush*, 87 N. E. 469 (Mass.).

“This hole was plainly to be seen and was one of the obvious risks of the business as carried on by the defendant, and we think that the defendant could not reasonably have anticipated the need of any information as to its existence, or the need of any warning to be careful. It was exactly what might be expected to exist in such a floor in such a room used for such purposes as was this room. There



was no evidence of any change since the plaintiff entered into the defendant's employment.''

Held, that the employee assumed the risk of injury from this hole.

*Pearson vs. Boston Gas Light Co.*, 87 N. E. 571 (Mass.).

See also

*Williams vs. Bunker Hill & S. Mine & C. Co.*, 200 Fed. 211;

*C. B. & Q. R. Co. vs. Shalstrum*, 195 Fed. 725;

*Anthony vs. Leeret*, *supra*.

*Smith vs. Lincoln*, 84 N. E. 498 (Mass.);

*Feely vs. Pearson Cordage Co.*, 37 N. E. 268 (Mass.);

*McCafferty vs. Cleansing Co.*, 80 N. E. 460 (Mass.);

*Hoard vs. Blackstone Manufacturing Co.*, 58 N. E. 180 (Mass.);

*Wanamaker vs. Burke*, 2 Atlantic 500 (Penn.);

*Oleksy vs. Midland Linseed Co.*, 168 Fed. 896.

NEITHER DEFENDANT IS LIABLE UNDER THE  
FEDERAL STATUTE.

Section 2 of the Federal Statute provides that a common carrier by railroad in a Territory, shall be liable in damages to a person in its employ for injury "resulting in whole or in part, from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves, or other equipment."

As we have already shown, in order to maintain an action under this statute, it must first appear that the employer is a common carrier by railroad in the Territory, and we have shown that the evidence conclusively proves that the Katalla Company was not such common carrier, and that the Copper River & Northwestern Railway Company was such common carrier. It must next appear that the injured party was employed by such common carrier, and we think the evidence conclusively shows that plaintiff was not employed by the Copper River & Northwestern Railway Company, but was employed by the Katalla Company, and for these reasons, he could not maintain an action against either Company under this statute.

But even if we are not correct in this contention, nevertheless, we think that this action cannot be maintained under this statute, and the evidence in this case. The statute gives a right of action only where the injury results in whole or in part, from the "negligence" of the officers, agents or employees of the carrier, or by reason of a defect or insufficiency "due to its negligence," in the appliances, etc., of the carrier. In this case, plaintiff's injuries were not due to the negligence of any of the officers, agents or employees of either of the defendants. There is no statute imposing any duty on the part of an employer in Alaska, to guard or light the edge of a platform like the one in question, and in the absence of such a statute, the measure of defendants' duty in this particular, and therefore, of their negligence, is the rule at common law. If they would not be negligent at common law in failing to guard or light this end of the platform, then they would not be negligent under the statute, and this action could be maintained thereunder. We do not think this contention could be doubted, and if our argument that there was no negligence on the part of defendants at common law is correct, then of course, in no event could this action be maintained under the Federal statute.

But if we are not correct in this contention, we still contend that the action cannot be maintained under this statute. Section 3 of the Federal Act takes away the

defense of contributory negligence, except that it permits the damages to be diminished in proportion to the amount of negligence attributable to the employee, and provides that the employee shall not be guilty of contributory negligence *where any statute enacted for the safety of employees has contributed to his injury*. By the term "statute" is clearly meant any Federal statute.

*Horton vs. Seaboard Air Line R. Co.*, 78 S. E. 494 (N. C.).

There was no statute which required defendants to guard the end of this platform by rail or light, therefore, under the provisions of Section 3 of the Act of 1908, plaintiff's contributory negligence was a defense to the extent his negligence contributed thereto. We think the court will be satisfied under the undisputed testimony in the case that plaintiff's negligence was the sole cause of his injury, and in such case, no recovery could be had under the statute.

But we do not think a recovery could be had under the statute for another reason. Section 4 of the Act of 1908, provides that in an action brought under the provisions of that Act, the "employee shall not be held to have assumed the risks of his employment, *in any case where violation by such common carrier of any statute enacted for the safety of employees, contributed to the injury or death of such employee.*" The court will note that Congress has recognized in these two sections the

clear distinction between contributory negligence and assumption of risk. It has taken away the defense of contributory negligence entirely, except that the employee's damages shall be diminished in proportion to the amount his negligence contributed thereto. But the statute has taken away the defense of assumption of risk only where the carrier has violated some statute enacted for the safety of the employees, which violation contributed to the injury.

This statute being in derogation of common law, must be strictly construed, and the court cannot read into the statute anything not clearly within its express terms. The rule of assumption of risk has its basis in the principles of the common law, and depends for its existence upon the relation of employer and employee existing between the parties. While some courts base the rule upon the maxim, "*volenti non fit injuria*," the free translation of which is that he who prefers to remain in the presence of an obvious or manifest danger cannot recover for injuries resulting therefrom, other courts base the defense upon the contract of employment between the parties.

However, we do not think it necessary in this case to discuss whether the doctrine of assumption of risk is based upon contract, or the maxim "*volenti non fit injuria*," although we think this court is committed to the view that the defense is based upon contract.



*Welsh vs. Barber Asphalt Paving Co.*, 167 Fed. 465.

But whether arising from contract or based on the maxim, we think it makes no difference in this case. If based upon contract, then the effect of the contract between the parties was that plaintiff contracted to do his work with reference to the unguarded and unlighted condition of the end of this platform, which he well knew, and which he contracted should not be negligence on the part of his employer if left in this condition. On the other hand, if the defense is based on the maxim, then it clearly appears that he voluntarily continued in his employment in the face of the well-known, unguarded and unlighted condition of the end of the platform, and as he made no complaint of this condition, and never requested that a guard or light be placed there, and was never promised that there should be, he willingly assumed all the risk of injury because of the condition of the place where he was to do his work.

The Supreme Court of Iowa, in the case of *Scott vs. C. R. I. & P. R. Co.*, 141 N. W. 1065, clearly recognized that the defense of assumption of risk in the absence of a statute applying, is not taken away by the Federal Employer's Liability Act.

We think the decision of the Supreme Court of the United States in the case of *Texas & P. R. Co. vs. Harvey*, *supra*, also sustains this contention.

This is also recognized in the decision of the Circuit Court of Appeals for the First Circuit, in the case of *Boston & M. R. Co. vs. Benson*, 205 Fed. 876.

The Supreme Court in the *Second Employer's Liability* cases, 223 U. S. 1, also recognizes that this statute does not take away this defense, except where the carrier has violated some express statute enacted for the safety of the employee, which violation contributed to the injury.

When we consider that Congress, in the Second Employers' Liability Act, undertook to cover the entire field so far as was desired, of the relationship between carrier and employee, and in doing so took occasion to expressly designate the particular risks of injury which the employee should not assume, it logically follows that Congress meant to declare that the common law still remains in existence as to all other cases where the defense would be available in the absence of this statute. It cannot be claimed that Congress intended to repeal the entire common law in relation to assumption of risk, and unless it did so, the common law, except as modified by the express terms of Section 4 of the Act is still in force.

The Supreme Court of Idaho, in the case of *Neil vs. Idaho & W. N. R. Co.*, 125 Pac. 331, 335, speaking through Mr. Justice Sullivan says:

"1. We will first determine whether said Act of Congress is applicable to the facts of this case.

“That Act of Congress refers only to the interstate commerce, abrogates the fellow-servant rule, extends the carrier’s liability to cases of injury and death, and restricts the defense of contributory negligence and assumption of risk.”

The learned judge, at page 336, indicates in what manner the defense of assumption of risk has been restricted, saying:

“Under the provisions of Section 4 of said Act, it is provided that the employee shall not be held to assume the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employees contributed to the death or injury of such employee, and, as it is not claimed in this case that the company had violated any statute enacted for the safety of employees the defense of assumption of risk remains as at the common law.”

The Supreme Court of Texas, in the case of *Freeman, Receiver vs. Powell*, 144 S. W. 1033 (decided February 3, 1912), in which Mr. Justice Conner, speaking for the court, after quoting Section 4 of the Act of April 22, 1908, said:

“It thus appears that under the federal statute a complaining employee to whom the Act applies is not relieved from the operation of the ordinary rule of assumed risk, except in cases where there is a violation by the carrier of some statute enacted for the safety of an employee which has contributed to his injury or death, and of this there is no contention in this suit.”

It would seem to us from the foregoing authorities and a plain reading of the statute, that the plaintiff in this case, knowing the exact condition of the platform upon which he was working, and its unguarded and unlighted end, toward which he walked, and being a man of full age and in possession of all his faculties, at common law assumed the risk of injury because of the condition of the platform, and also any risk of walking toward the platform with only the hand lantern which had been furnished him; and that the defendants, under these circumstances, could not in any event be made to respond for his injuries; that the rule of common law still obtains so far as this case is concerned, and has not been abrogated by any federal statute, and it therefore follows that the defense of assumption of risk is available to the defendants in this case, and is a complete bar to any recovery by plaintiffs.

## ERRORS IN INSTRUCTIONS GIVEN AND REFUSED.

Errors are assigned to the giving of certain instructions, and to the refusal to give certain instructions requested by defendants, which errors are covered by the foregoing argument.

The Court instructed the jury as follows:

“You are instructed that the rule of law is that between master and servant, the master is liable for all accidents occurring in the course of the employment, which are not induced by the carelessness or improper conduct of the employee or servant.”

“In other words, the master is bound to use reasonable care and diligence to prevent accident or injury, and if he does not he will be responsible for the damages, unless the servant assumed the risk or contributed to the injury through his own negligence, or the negligence of a fellow-servant.”

“As between master and servant negligence should be measured by the character and risk of the business engaged in, and the degree of care of both master and servant is higher when the lives and limbs are endangered than in ordinary cases.”

Assignment of Errors Nos. XII, XIII, XIV (R., pp. 223-224).

It would seem to us that these instructions were clearly erroneous. It was certainly error to instruct the



jury that the master is liable for all accidents occurring in the course of the employment, which are not induced by the carelessness or improper conduct of the employee; and we do not think the qualification which followed, to the effect that the master is bound to use reasonable care and diligence to *prevent accidents or injury*, and would be liable if he did not do so, unless the servant assumed the risk or contributed to his injury, or the same was caused by the negligence of a fellow-servant, took away the vice of the former instruction or correctly stated the rule of law to the jury.

The instruction should have been that the defendants, if they were the employers in this case, were required to use reasonable care and prudence to furnish plaintiff a reasonably safe place in which to do his work, and that a failure in this regard would render the defendant liable at common law, unless plaintiff was guilty of such contributory negligence or assumed the risks, as to bar a right of recovery. A master is not bound to use reasonable care and diligence "to prevent accident or injury," and such a rule would impose upon the master a greater responsibility in this case than is imposed either by common law or the federal statute.

The instruction that the degree of care required of the master where lives and limbs are endangered is higher than in ordinary cases, is not proper under the facts in this case, and this instruction, given with the other in-

structions referred to, gave the jury to understand that where it is possible for an employee to sustain injury to his limbs or his life is endangered, the master is bound to see that he was not so injured, making the master practically an insurer against such injury; when under the well settled rules of law the master was only required to use reasonable care and prudence to furnish a reasonably safe place for plaintiff to do the work he was required to do in this case.

The Court also instructed the jury as follows:

“All acts and duties which the master is bound to perform toward his employees and servants, which he delegated the performance of to others as an agent, then the agent occupies the same place as the master and the master is deemed present and liable for the manner in which such duties are performed.”

Assignment of Errors No. XV (R., pp. 224-225).

This is not a correct statement of the law, because it is only those non-delegible duties which the master is bound to perform, which he cannot delegate to an agent and escape liability for the failure of such agent to perform such duty. There was no evidence in the case that any fellow-servant or vice-principal had neglected to furnish a proper light or guard for the platform in question, and this instruction had no place in the case, but by giving it, the jury would understand that the defend-

ants were negligent in this case in failing to properly light and guard the edge of the platform.

The Court also instructed the jury as follows:

“You are instructed that the servant does not assume the extraordinary or unusual risks of the employment, but on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knew of or may have known in the exercise of reasonable care, except that he does not assume such risks as are created by the master’s negligence.

Assignment of Errors No. XVII (R., p. 225).

This instruction is certainly not correct. A servant may assume extraordinary or unusual risks of which he knows, unless some statute provides otherwise. He may also assume risks created by the master’s negligence, of which he is aware, unless some statute provides that he shall not be deemed to have assumed such negligent acts.

*Katalla Company vs. Rones*, 186 Fed. 30;

*Pacific T. & T. Co. vs. Starr*, 206 Fed. 157.

The Court also instructed the jury as follows:

“Where the negligence or want of ordinary care and caution of a servant so far contributed to his injury that it would not have occurred but for such negligence, he cannot as a rule recover. But if the injury is caused by the gross or wilful negligence of the master or his agents, or if the consequences of the servant’s negligence might have been

avoided by the exercise of ordinary and reasonable care on the part of the master or his agents, then the servant could recover though himself negligent."

Assignment of Errors No. XVIII (R., pp. 225-226).

There was no evidence in this case of any "gross or wilful negligence" on the part of defendants, or their agents, and it is certainly not the law that if the consequences of the servant's negligence might have been avoided by the exercise of ordinary and reasonable care on the part of the master, or his servant, then the servant could recover although he was himself negligent. Such a rule of law would entirely destroy the defenses of contributory negligence and assumption of risk.

The Court also instructed the jury as follows:

"All servants engaged in the same common work, without any dependence upon or relation to each other, except as co-laborers without rank, under the direction and management of the master, or his agents, are fellow-servants."

Assignment of Errors No. XIX (R., p. 226).

This is not the correct rule of law in Federal courts. Under Federal decisions, neither mere superiority of rank nor right of one servant to exercise control over another will constitute the former a vice-principal of the corporation master, with respect to the latter, but it must be shown that he is intrusted by the master with departmental control.

*Moss vs. Gulf Compress Co.*, 202 Fed. 657  
(C. C. A. 5);

*Alaska Gold Min. Co. vs. Musit*, 114 Fed. 66  
(C. C. A. 9).

The Court also instructed the jury as follows:

“To render the master not liable for an injury to a servant caused by the negligence of a fellow-servant, it must be shown that the injury directly resulted by reason of such fellow-servant’s negligence, that is, that it was the proximate cause thereof and not the negligence of the master.”

Assignment of Errors No. XX (R., p. 226).

This instruction also takes away the defense of contributory negligence and assumption of risk, and in effect, told the jury that if the injury was proximately caused by the negligence of a fellow-servant, then the employee could recover even though he were guilty of contributory negligence or assumption of risk.

The Court instructed the jury as follows:

“This is your last case at this term of court, of which you have had several on the same general subject of personal injuries.”

Assignment of Errors No. XXII (R., p. 227).

This instruction impliedly told the jury that they were to take into consideration in this case instructions which the court had given them in previous personal injury trials during that term of court. What those instructions were, of course, we do not know, but it cer-



tainly was not proper for the court to tell the jury in effect that they might consider any instructions which he had given in any other trials, but he was bound to instruct the jury on all the law of the case at issue, as though they had never received any instructions in similar cases before.

Defendants requested the Court to give to the jury the following instruction, which was refused:

“You are instructed that if you find from the evidence that the plaintiff had been warned that when trains were passing through the tunnel that he should quit work and either come down from the roof of the tunnel or not move around and he failed or refused to obey said orders, and he would not have been injured if he had obeyed said orders and he was injured by refusing to obey said order, then you are instructed that the plaintiff cannot recover in this action.”

Assignment of Errors No. XXIV (R., pp. 228-229).

Certainly this instruction was correct, because there was evidence in the case tending to show that plaintiff had received such instructions, and that he violated them, thereby causing his injury; and certainly he could not recover against defendants under either the common law or the statute, if his injuries resulted from a violation of positive instructions given him by defendants as to how he should do his work.

Defendants requested the following instruction, which was refused:

“You are instructed that the plaintiff is presumed to know the dangers that he has an opportunity to observe and that he must inform himself of open, obvious risks and if he does not do this and is injured by reason of his failure to do so, then he can not recover.”

Assignment of Errors No. XXVI (R., p. 229).

We think this instruction was proper, whether recovery could be had under the common law or the statute. It was certainly correct if the action is based on the common law, and as the Court instructed the jury as to the law applicable if his recovery was had under the common law, this instruction should have been given in any event.

We think under the authorities already cited, the instruction was also proper even if the action was based on the Federal Statute.

Defendants also requested the Court to give the jury the following instruction, which was refused:

“You are instructed that if the plaintiff continued working with knowledge actual or constructive of dangers which an ordinary prudent man would refuse to subject himself to, he is guilty of contributory negligence and cannot recover.”

Assignment of Errors No. XXVII (R., p. 230).

We think this instruction should have been given for the reasons last stated.

Defendants also requested the Court to give the jury the following instructions, each of which requests was refused:

“You are instructed that plaintiff has admitted in this case that he was working as a carpenter at the time of his injury and that he was familiar with and knew that at the place where he fell over had no guard-rail across it, which fact was known to him for several days prior to the accident and at the time of the accident, therefore you are instructed that if the plaintiff continued working with knowledge of these facts as he has testified that he did have, and if you further find that he knew or ought to have known as a reasonably prudent man, that it was dangerous not to have a guard-rail at this place, and no one in authority had promised to have a guard-rail or other protection at this place, then you are instructed the plaintiff assumed the risks incident to no guard-rail being at the point or place where he fell.”

“You are instructed that plaintiff has admitted in this case that he was working as a carpenter at the time of his injury and that he was familiar with and knew that at the place where he fell over had no guard-rail across it, which fact was known to him for several days prior to the accident, and at the time of the accident, therefore you are instructed that if the plaintiff continued working with knowledge of these facts as he has testified that he did have, and if you further find that he knew or ought to have known as a reasonably prudent man, that it was dangerous not to have a guard-rail at this place, and no one in au-

thority had promised to have a guard-rail or other protection at this place, then you are instructed that the plaintiff assumed the risks incident to no guard-rail being at the point or place where he fell and can not recover in this case."

"You are instructed that plaintiff has admitted that he knew at the time of his accident, and for several days prior thereto, that there was no guard-rail or other protection at the point or place where he fell, and has admitted that he knew that trains were running through this tunnel and that smoke from the engines surrounded the place where he was working, and that while he was surrounded by smoke from the engine he voluntarily continued working when he knew that he could not see where he was walking and that he did proceed and while walking stepped off of the point or place where he claims there was no guard-rail; therefore, you are instructed that the plaintiff assumed the risks of walking or trying to work at that time."

"You are instructed that plaintiff has admitted that he knew at the time of his accident, and for several days prior thereto, that there was no guard-rail or other protection at the point or place where he fell, and has admitted that he knew that trains were running through this tunnel and that smoke from the engines surrounded the place where he was working, and that while he was surrounded by smoke from the engine he voluntarily continued working when he knew that he could not see where he was walking and that he did proceed and while walking stepped off of the point or place where he claims there was no guard-rail; therefore, you are instructed that the plaintiff assumed the risks of walking or trying to

work at that time, and he is guilty of contributory negligence.”

“You are instructed that plaintiff has admitted that he knew at the time of his accident, and for several days prior thereto, that there was no guard-rail or other protection at the point or place where he fell, and has admitted that he knew that trains were running through this tunnel and that smoke from the engines surrounded the place where he was working, and that while he was surrounded by smoke from the engine he voluntarily continued working when he knew that he could not see where he was walking and that he did proceed and while walking stepped off of the point or place where he claims there was no guard-rail; therefore, you are instructed that the plaintiff assumed the risks of walking or trying to work at that time, and he cannot recover in this case.”

Assignment of Errors. XXIX, XXX, XXXI, XXXII, XXXIII (R., pp. 230-234).

We think each of these instructions was proper and should have been given for the reasons already stated.

For the reasons hereinbefore stated, we respectfully submit that the judgment of the trial court should be reversed, and the action dismissed, or a new trial granted.

W. H. BOGLE,

CARROLL B. GRAVES,

F. T. MERRITT and

LAWRENCE BOGLE,

*Attorneys for Plaintiffs in Error.*





No. 2300

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit.

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COPPER RIVER & NORTHWESTERN  
RAILWAY COMPANY (a corporation),  
and KATALLA COMPANY (a corpora-  
tion),

*Plaintiffs in Error,*

vs.

JAMES HENEY,

*Defendant in Error.*

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## BRIEF FOR DEFENDANT IN ERROR.

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### Statement of the Case.

' In this brief the parties will be designated as in the Court below.

The plaintiff, James Heney, sued to recover damages for personal injuries suffered by a fall through an open hatchway in a platform to the ground twenty-one feet below, in a tunnel on the line of the Copper River & Northwestern Railway Company near Chitina, Alaska. He alleged that he was working in the nominal employ of the Katalla

Company, one of the defendants herein, but in reality the work was done for the Copper River & Northwestern Railway Company, the other defendant, of which the Katalla Company was alleged to be an agency. He alleged negligence on the part of the defendants in not having the tunnel better lighted, or the hatch in some way safeguarded. The defendants answered separately, the Copper River & Northwestern Railway Company denying all the allegations of the complaint except its corporate existence, and the Katalla Company denying all allegations except its corporate existence and that it was doing business in Alaska. They also pleaded the affirmative defense of contributory negligence, assumption of risk and negligence of a fellow servant.

The case was tried before a jury and a verdict rendered for \$2125.00 in favor of the plaintiff, and the Court entered judgment for that amount. The defendants then sued out this writ of error.

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### **Assignment of Errors.**

Thirty-seven errors by the Court are assigned by the defendants, as plaintiffs in error, as grounds for reversal of the judgment. Many of these assignments are practically repetitions and are merely efforts to attain the same point by stating identical objections or arguments in different ways. The real assignments of error appear to counsel for

plaintiff, defendant in error, to be fairly stated as follows:

1. The Court erred in the admission of evidence to show the lighting of the tunnel prior to the day of plaintiff's injury, and the advantage of a danger light at the place where the mishap occurred.

2. The Court erred in admitting certain testimony to show that both defendants were common carriers.

3. The Court erred in refusing to direct a verdict for the defendants.

4. The Court erred in certain instructions to the jury.

5. The Court erred in refusing instructions asked by the defendants.

Combining the errors into these groups counsel for the plaintiff respectfully submits the following

### **Argument.**

The defense, aside from attempted evasions of liability and responsibility, were contributory negligence and assumption of risk. Negligence of a fellow servant was pleaded, but no evidence was offered on that line of defense. Plaintiff contended that the necessary risks of the employment were slight, and that his own negligence, if any, was slight; that the accident could not have happened but for the negligence of the defendant corporations; that if the defendants had safeguarded the hatch through which he fell, either by a railing or

by a light, or if the whole tunnel had been well lighted, all chance for the accident would have been avoided. To support his contention, plaintiff offered evidence which was hardly disputed, of the following facts and circumstances:

That the tunnel was well lighted for several weeks; while plaintiff was working in it, by two powerful acetylene lights; that these were removed, one at a time, and, after the second was removed, gasoline torches were used, which gave a fair light. That, for two or three days, up to and including the day of the accident, only hand lanterns were supplied. Of these, on that day, the four men working on the platform had only three. While the tunnel was lighted by large lights, the hatch was easily visible (R. 31-32-39-99). When reduced to three small lanterns, the men could see it only by holding a lantern close to it (R. 39). When the tunnel was filled with smoke after the passing of an engine they could scarcely see anything, a lantern merely showing a faint red glow, without radiating light (R. 39-104-105-109-110-111-129-130). No effort was made to furnish better light, or even more lanterns, although the men asked for them (R. 102). No railing was put along the hatch, and no planks supplied to cover it (R. 40-116-117). This situation had existed for two or three days (R. 32-39-40-99-134-5). A train went through just prior to Heney's fall, the engine leaving a dense volume of smoke and gas in the tunnel, confusing the faculties (R. 44-103-104-128). Heney fell



through the hatch while groping with a lantern in his hand.

Error is assigned in the admission of testimony to show that a few days prior to the accident the tunnel had been well lighted, and that even after the workmen were reduced to small hand lanterns to work by, if an additional small light had been placed at the edge of the hatch, its location would have been sufficiently indicated to prevent anyone from falling into it.

Testimony on both of these points was clearly admissible. It is the duty of an employer, when he changes the conditions surrounding work which involves any hazard, to take reasonable precautions for the safety of employees applicable to the changed conditions. It seems needless to cite authorities on this rule, but the following is given as decisive, from *Kreigh v. Westinghouse & Co.*, 214 U. S. 256:

“Nevertheless, the duty of providing a reasonably safe place for the carrying on of the work is a continuing one, and is discharged only when the master furnishes and maintains a place of that character.”

As late as *Santa Fe & Pacific R. R. Co. v. Holmes*, 202 U. S. 438, it was declared:

“The duty is a continuing one and must be exercised whenever circumstances demand it.

“Where workmen are engaged in a business, more or less dangerous, it is the duty of the master to exercise reasonable care for the safety of his employees, and not to expose them

to the danger of being hurt or injured by the use of a dangerous appliance or unsafe place to work, where it is only a matter of using due skill and care to make the place and appliances safe."

Choctaw, Oklahoma etc. R. R. v. McDade,  
191 U. S. 64, 66,

and cases there cited.

The rule is more tersely stated in Santa Fe Pacific Railroad Company v. Holmes, 202 U. S. 438, as follows:

"The duty of the master to furnish safe places for employees to work in and safe appliances to work with is a continuing one, to be exercised wherever circumstances require it. \* \* \*"

When the defendants took out the lights, which lighted the tunnel like a city street (R. 31-99), and gave four men only three small lanterns for their work, conditions were certainly so changed that the continuing duty to take reasonable precautions for the safety of the employees required that some special safeguard or danger signal be placed at the hatch to give constant warning of its proximity. Roadmaster Forrester, who was in charge of the work when the accident occurred, testified on cross-examination that a cheap railing or small lantern could easily have been placed at the edge of the hatch, and "it would have been a precaution, yes, sir" (R. 167).

The issue being that of negligence chargeable to either party or both, it was proper to admit evi-

dence of changed conditions or of possible precautions, to aid in fixing responsibility:

“In respect to the assumption, by a servant, of extraordinary risks, a risk becomes transformed from an ordinary one to an extraordinary risk, whenever, among other conditions, the master’s negligence contributes an added hazard to the situation in which the servant is placed; the word ‘extraordinary’ not being used to denote magnitude, or as a mark of degree, but to indicate that the risk is one which lies outside of the sphere of the normal.”

Baer v. Raird Mach. Co., 79 Atl. 673 (Conn.).

In considering these two assignments of error, it is well to read a little more testimony along with that quoted by defendants.

See, testimony of W. H. Slimpert, page 102 of the record:

“Q. After you got down to hand lanterns, did you ever ask for any other lights—speak to anybody in authority about it?

A. Well, we spoke several times to Mr. Forrester, I did, saying, we could use more lights.

Q. Were any other lights given you?

A. Not at that time. Later, after this, Mr. Forrester and I went down and took a head-light off one of those dinky engines that sat down by the depot. We did take it off and use it in the tunnel.”

Clearly, no adequate effort was made by the companies to meet added hazards. They were culpably negligent.

“If negligence of the master in failing to provide and maintain a safe place to work con-

tributed to the injury received by the plaintiff, the master would be liable, notwithstanding the concurring negligence of those performing the work."

Grand Trunk R. R. Co. v. Cummings, 106 U. S. 700;

Deserant v. Cerillos Coal Railroad Company, 178 U. S. 409, 420, and cases there cited;

Kreigh v. Westinghouse & Co., *supra*.

The third assignment of error criticises the statement of the Court that instructions of a foreman would not be binding on the plaintiff unless the jury found that he received them. We submit that the Court merely stated the law.

The fourth and fifth assignments of error refer to the reading to the jury of headings of waybills and bills of lading identified by witnesses, as used in freight shipments on the railroad, for the purpose of showing that both defendants were doing business as common carriers and that the Katalla Company was doing business for the Copper River & Northwestern, and was employing plaintiff in that business at the time he was hurt.

Printed matter is admissible as evidence of its purpose and use if sufficiently identified.

Wigmore on Evidence, Vol. III., Sec. 2150.

In this case the bill of lading was identified by M. V. Lattin, a station agent of the railway company (R. 150-151). Lattin also testified as to the passenger tickets (R. 151), "They have read the

Katalla Company for, I believe, up six months ago I got a Northwestern ticket then." Lattin further testified concerning the way bills, that, until a few months before the trial of this case, which trial was more than a year after the injury complained of, the form read, "The Katalla Company, Constructing and Operating the Copper River & Northwestern Railway Company."

Counsel for defendants also objects (sixth assignment of error) to the testimony of the deputy clerk of the Court, T. S. Scott, as to the incorporation papers of the Katalla Company on file in the clerk's office, which were offered and read but not made exhibits. This testimony also tended to show, what was difficult to prove except by piecemeal because of the evasions of defendants, that both defendants were common carriers, and that the Katalla Company did business over the Copper River Company's tracks.

Here let it be noted that the defendant corporations made an evasive defense throughout. They began by denying under oath everything alleged in plaintiff's complaint, except that each admitted its own corporate existence and the Katalla Company admitted that it was doing business in Alaska. Each company, therefore, made a verified denial of the corporate existence of the other, and denied that the railway company owned its own line of railroad, and denied that said railway company was doing business in Alaska. These sworn denials compelled plaintiff to offer evidence



of notorious facts that defendants made no effort to controvert. Plaintiff alleged and proved to the satisfaction of Court and jury that he was working for both corporations and that both were common carriers; the Katalla Company operating over the Copper River tracks. Both defendants sought to evade liability by shifting responsibility. This evasive defense runs all through the evidence, but is most happily exemplified by an abstract from the cross-examination of J. W. Forrester, roadmaster of the railway company, by counsel for the defendants, when he had been called as a witness for the plaintiff. If any doubt is left after all the other evidence as to either defendant corporations having been a common carrier at the time of the plaintiff's injury and for a long time prior thereto, the doubt is certainly removed by this testimony. Questions by Mr. Boyer, attorney for the defense (R. 148-9-50):

“Q. Now, as a matter of fact, do you know anything in regard to the business relations or connections between the Katalla Company and the Copper River & Northwestern Railway Co.?”

A. I do not.

Q. You have never seen any of their contracts?

A. No, sir.

Q. Do you, as a matter of fact, know whether the Katalla Company is operating this road at the present time or not, or if the Copper River & Northwestern Co. is operating the road at this time?

A. I don't know, no sir. I couldn't testify.

Q. You know there are trains running up and down this road?

A. Yes, sir.

Q. You know that freight and passengers are being carried up and down this road?

A. Yes, sir.

Q. You don't know who has the license to operate this road?

A. No, sir.

Q. I will ask you if you know that the articles of incorporation of the Katalla Company provide that it can do a common carrier business?

A. I don't know anything about it.

Q. I will ask you if you don't know or if you do know if the Copper River & Northwestern Railway Co. has a license to do a common carrier business over this particular line?

A. I don't know whether they have or not.

Q. I will ask you from whom you were drawing your checks at that time?

A. The Katalla Company, to the best of my recollection—I couldn't say positively.

Q. On your direct examination, Mr. Ritchie asked you what was your position with the Copper River & Northwestern Railway Co. at that time, and you stated you were resident engineer—do you know if you were resident engineer for the Katalla Company or for the Copper River & Northwestern Railway Co. at that time?

A. I was resident engineer on the railroad; that is all I know about it.

Q. You don't know, as a matter of fact, whom you were working for?

A. No, sir; I do not.

Q. Mr. Ritchie asked you whether the railroad company was doing a common carrier business and I believe you answered in the affirmative. I will ask you if you knew or if

you know now whether it was the Katalla Company that was doing a common carrier business or if it was the Copper River & Northwestern Railway Co. that was doing a common carrier business?

A. No, sir; I don't know what company it is.

Q. It wasn't your intention to tell the jury you knew which one was, or if either was doing a common carrier business?

A. I know the railroad handles freight and passengers—I don't know which company it is.

Q. That freight is carried up on trains?

A. Yes, sir.

Q. But whether it is a company, corporation, individual, or what it is, you don't know?

A. No, sir."

Comment on the foregoing testimony would burden the patience of the Court.

Assignment number seven assigns error in denying a motion to quash service of summons on the Katalla Company. As that defendant immediately answered, it is hardly needful to say it thereby waived objection to the route by which it arrived in Court.

Assignment number eight assigns error in denying a motion to make more definite and certain and a motion to strike. This motion, apparently, was directed against plaintiff's complaint, but was waived by pleading over, and is not printed in the record.

Assignment number nine assigns error in denying defendants' motions at the close of plaintiff's case for a nonsuit. That these were waived by de-

fendants' introduction of testimony in their own behalf, needs no citation of authority.

The tenth assignment of error goes to the Court's denial of defendants' motions at the close of all the testimony for a directed verdict, based on four grounds. The first ground urges that the Employers' Liability Acts take away the common law liability. The answer is, that those acts take away nothing from the common law liability, but simply add to it. No statute abrogates any part of the common law, except by express enactment or necessary implication. There is nothing in any of the Employers' Liability Acts which expressly or impliedly takes away the common law liability in this case.

It is further urged in this assignment that it was necessary for plaintiff to establish that both defendants were doing a common carrier business. This is untenable. It is only necessary to prove that either company was a common carrier to hold that company, and that both were common carriers to hold both, under the Employers' Liability Acts. But, in any case, if common law liability was established by the evidence, that liability would attach to the culpable defendant or defendants, regardless of the Employers' Liability Acts.

The second ground urged in this assignment of error is the averment that plaintiff failed to prove that he was working for the Katalla Company. He testified on cross-examination by counsel for the

Katalla Company that he was paid by the Katalla Company, as follows:

“Q. You were drawing your salary from the Katalla Company, were you not?

A. I had the Katalla Company’s check”  
(R. 55).

This was not contradicted.

The third ground under this assignment refers to plaintiff’s admissions as to his knowledge of conditions. These are to be considered with all the other circumstances of the case and left to the jury.

The fourth ground is a mere generality. All the questions of fact in the evidence were entitled to go to the jury under the rule laid down in *Kreigh v. Westinghouse*, *supra*, as follows:

“Questions of negligence do not become questions of law to be decided by the Court, except where the facts are such that all reasonable men must draw the same conclusions from them, and the case is not to be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish.”

*Gardner v. Mich. Cent. R. R.*, 150 U. S. 348,  
361.

To the same effect are:

*Tex. & Pac. R. Co. v. Sweringen*, 196 U.  
S. 51;

*Schoeffler v. Nor. Pac. R. Co.*, 193 Fed. 627;

*Chicago & E. R. Co. v. Ponn.*, 191 Fed. 682;

*Katalla Co. v. Rones*, 186 Fed. 30;



Northwestern Lumber Co. v. Cizen, 196 Fed. 454;

Republic Elevator Co. v. Lund et al, 196 Fed. 745;

C., M. & St. P. R. Co. v. Mills, 187 Fed. 800;  
and

Penn. R. Co. v. Forstal, 159 Fed. 893.

We submit without argument that there was no error in the instruction complained of in the eleventh assignment.

The instruction objected to in the twelfth assignment of error might be misleading if it were not qualified by the language immediately following, given in the thirteenth assignment of error. The two are in separate paragraphs in the record, but the Court was not responsible for that, as the instructions were given orally, as shown by the reporter's certificate on page 182 of the record. The second statement gives the law as it was before the Employers' Liability Acts. Under these laws, the statement is too favorable to the defendants, but the Court was then stating the common law. As this case is to be determined under both the common law and the statutes mentioned, the only error in these instructions which could be harmful, would be the statement of defenses which are taken away or modified by the statutes. The fellow servant rule is not an issue in this case except in the pleadings, and the issue of contributory negligence is limited to the extent of plaintiff's negligence by the Employers' Liability Acts.

Counsel for plaintiff submit without argument that the errors alleged in assignments numbered fifteen to twenty, inclusive, state the law, and that there is no error in any of them. The instructions regarding fellow servants were not necessary to this case.

In the twenty-first assignment of error, defendants object to the incorporation in the instructions of the Court of an extract from the Employers' Liability Acts. Inasmuch as counsel for the defense insisted throughout the trial that the action was subject to the provisions of those acts, exclusive of common law liability, and makes this point in numerous exceptions to the instructions, it is difficult to see on what ground defendants can object to a citation from the statute in question.

The statement of the Court assigned as error in the twenty-second assignment, though foreign to the case, was absolutely harmless.

Assignment number twenty-three complains of the refusal of the Court to give an instruction asked by the defendants regarding the proof of liability of one or both. This was fully covered in substance by the tenth instruction given by the Court.

The assignments of error numbered twenty-four to thirty-five, inclusive, except the twenty-eighth, are identical in substance, and raise practically the same contention as the motion for a directed verdict. The objection is to the refusal of the Court to instruct the jury in effect that if the plaintiff

was negligent he could not recover. The instructions asked and refused wholly ignore the question of the employer's negligence, and would exempt him from liability if the employee was negligent, or assumed any risk. The contention of defendants is wholly disposed of by the citations already given in discussing the motion for a directed verdict. This contention seeks to exempt the employer from all liability for his own negligence and lack of reasonable precaution for the safety of employees in any case where the element of assumption of risk or contributory negligence enters in any degree. This is not the law, and never was the law, even before the Employers' Liability Acts. Not only was the employer always held if he was guilty of gross negligence, but the employee has been excusable for negligent action under stress of circumstances if the master's gross negligence created the conditions which made the injury possible.

In *Kane v. Northern Central Railway Company*, 128 U. S. 91, a Pennsylvania case decided in 1888, a brakeman was injured in climbing down a freight car from which a step was missing. He knew the step was missing, but in haste to reach his post, there being a bitter winter storm blowing, he fell under the train and lost both legs. He admitted that he forgot about the missing step. The Circuit Court took the case from the jury on the ground of contributory negligence. The Supreme Court

reversed the judgment by a unanimous decision. In the opinion, Mr. Justice Harlan said:

“It cannot be said that the plaintiff was guilty of contributory negligence in staying upon the train in the capacity of brakeman, after observing that a step was missing from one of the cars over which he might pass while discharging his duties. \* \* \* But in determining whether an employee has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might be reasonably expected, regard must always be had to the exigencies of his position, indeed, to all the circumstances of the particular occasion. \* \* \* In the case before us, the jury may, not unreasonably, have inferred from the evidence, that while the plaintiff was passing along the top of the cars, for the purpose of reaching his post, he was so blinded or confused by the darkness, snow and rain, or so effected by the severe cold, that he failed to observe, in time to protect himself, that the car from which he attempted to let himself down was the identical one which, during the previous part of the night, he had discovered to be without its full complement of steps.”

In the case at bar, “the jury may, not unreasonably, have inferred from the evidence” that the cold weather, the darkness of the tunnel, and the strangulating smoke and gas, all combined to confuse plaintiff’s mental faculties as well as to blur his vision, so that he was unable, momentarily, to exercise his ordinary perceptions. And the jury must have found, before finding the verdict, that the companies were grossly negligent in not taking

slight and inexpensive precautions to safeguard the hatch.

The twenty-eighth assignment of error criticises the refusal of the Court to instruct the jury that unless the Katalla Company was found to be a common carrier, plaintiff could not recover in this action. This proposition of law is so queer that it hardly deserves notice. Even if the Katalla Company was not a common carrier, it was subject to common law liability, and whether it was liable at all or not, the Copper River & Northwestern might be liable either under the statutes or the common law. The action might have been dismissed as to the Katalla Company without affecting the Copper River & Northwestern.

The errors assigned in the twenty-sixth assignment in refusing to instruct that plaintiff could not recover unless both defendants were found to be common carriers, and in the twenty-seventh in denying defendants' motion for a new trial and in entering judgment only raise points urged in other assignments and require no further discussion.

In conclusion, counsel for defendant in error respectfully submit that, on the whole record, no prejudicial error is shown that might possibly have harmed the plaintiffs in error. The issues were fairly and properly submitted to the jury, and certainly sufficient evidence was introduced to justify the verdict. The jury, in Alaska, are the exclusive judges of the evidence, of its weight, and



of the credibility of the witnesses. They returned a verdict for the plaintiff, which was a finding that the defendants were guilty of actionable negligence and that the plaintiff's right to recovery was not defeated by an assumption of risk or contributory negligence on his part.

E. E. RITCHIE,

T. C. WEST,

FERNAND DEJOURNEL,

*Attorneys for Defendant in Error.*

United States

Dec 2308

# Circuit Court of Appeals

For the Ninth Circuit.

ARTHUR B. CALLAHAM, for Himself and All  
Male Persons Residents of Juneau Precinct,  
Territory of Alaska, Over the Age of Twenty-  
one Years and Under the Age of Fifty Years,  
Appellant,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for  
Juneau Precinct, Territory of Alaska, and Ex-  
officio Collector of Poll Tax,  
Appellee.

## Transcript of Record.

Upon Appeal from the United States District Court  
for the Territory of Alaska,  
Division No. 1.

**FILED**

**AUG 27 1913**



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for the Territory of Alaska,  
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# INDEX OF PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Amended Complaint.....	2
Assignment of Errors.....	24
Attorneys, Names and Addresses of.....	1
Bond on Appeal.....	18
Certificate of Clerk U. S. District Court to Transcript of Record, etc.....	28
Citation on Appeal (Original).....	23
Demurrer .....	13
Judgment .....	14
Names and Addresses of Attorneys.....	1
Order Granting Petition for Appeal.....	17
Order Settling Record on Appeal.....	21
Petition for Appeal.....	16
Praecipe for Transcript on Appeal.....	26



[Names and Addresses of Attorneys.]

*In the District Court for the District of Alaska,  
Division Number One, at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All  
Male Persons Residents of Juneau Precinct,  
Territory of Alaska, Over the Age of Twenty-  
one Years and Under the Age of Fifty Years,  
Plaintiff and Appellant,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for  
Juneau Precinct, Territory of Alaska, and  
Ex-officio Collector of Poll Tax,  
Defendant and Appellee.

SHACKLEFORD & BAYLESS and Z. R. CHENEY,  
Counsel for the Plaintiff and Appellant, Res-  
idents of Juneau, Alaska.

J. W. RUSSELL, of Juneau, Alaska, Counsel for the  
Defendant and Appellee.

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*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All  
Male Persons Residents of Juneau Precinct,  
Territory of Alaska, Over the Age of Twenty-  
one Years and Under the Age of Fifty Years,  
Plaintiff,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for  
Juneau Precinct, Territory of Alaska, and  
Ex-officio Collector of Poll Tax,  
Defendant.

**Amended Complaint.**

Comes now the above-named plaintiff and for cause of action against the above-named defendant complains and alleges as follows:

I.

That the plaintiff is a male citizen of the United States, a resident of the town and precinct of Juneau, Territory of Alaska, over the age of twenty-one years, and under the age of fifty years.

II.

That on August 24, 1912, the Congress of the United States passed and the President of the United States approved a certain act entitled: "An Act to create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes," which said act is found in the 37th volume of the Statutes at Large of the United States at page 512; that prior to the passage of said act no legislative assembly had been provided for by law for the Territory of Alaska and no legislative assembly had met in the Territory of Alaska; that the said act provided that the first session of the said legislative [1\*] assembly should convene at the city of Juneau, Alaska, on the first Monday in March, 1913, which was the 3d day of March, 1913; that the said act further provided that no person holding a commission or appointment under the United States

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\*Page-number appearing at foot of page of original certified Record.

shall be a member of the legislature or shall hold any office under the government of said Territory.

### III.

That the defendant, John B. Marshall, holds a commission and appointment under the laws of the United States, to wit: as United States Commissioner for the District of Alaska, Juneau Precinct, and that the said defendant, under the act hereinafter mentioned, is also attempting to hold an office under the government of the Territory of Alaska and attempting to exercise certain duties of said office, to wit: the office of Ex-officio Collector of Poll Taxes for the Territory of Alaska;

### IV.

That subsequent to the 2d day of March, 1913, the Territorial Assembly for the District of Alaska passed a certain act entitled "An Act to impose a poll tax upon male persons in the Territory of Alaska and providing means for its collection," which said act was approved on the 1st day of May, 1913. Plaintiff alleges that it was the intention of the said legislature by the said act to provide for the imposition and collection of said poll tax after the 1st day of March, 1914, and not prior thereto; that the said act is in words and figures as follows, to wit:

"Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That there is hereby made, imposed and levied upon each male person, except soldiers, sailors in the United States navy or revenue cutter service, volunteer firemen, paupers, insane persons, or Territorial charges,



within the [2] Territory of Alaska or the waters thereof, over the age of twenty-one years, and under the age of fifty years, an annual tax in the sum of four dollars to be paid and collected in the manner provided in the following sections of this act.

Sec. 2. That the commissioner of each precinct in the Territory of Alaska, shall, on or before the first day of March in each year, set down upon such blanks as the Treasurer of the Territory of Alaska may prescribe, the names of all persons residing within his precinct subject to the tax herein provided for; one of such blanks shall be transmitted by the commissioner to the Treasurer of the Territory and the other shall be retained by him. At the time of transmitting one copy of said duplicate list of names of the persons subject to the tax herein provided for within his precinct, the commissioner shall cause to be published in at least one newspaper of general circulation published within his precinct, or if there be no newspaper, then by posting in five public places within his precinct a notice setting forth that the poll tax provided for in this act is due and payable between certain dates and that the payment thereof will become delinquent as provided in this act, and warning all persons to pay the same, and that in case of failure to pay the same, penalties, as herein provided for, will be imposed and it shall be the duty of every person liable to pay such tax, to pay the same to the commissioner within the

time in which such notice specifies.

Sec. 3. The tax herein provided for shall be paid between the first Monday in the month of April and the first Monday in the month of August in each year.

Sec. 4. It shall be the duty of the commissioner to receipt to each person upon payment of the poll tax herein provided for and the receipt so delivered shall be the only evidence of payment.

Sec. 5. Every person indebted to one who neglects or refuses, after demand, to pay a poll tax becomes liable therefor and must pay the same for such other person after service upon him by the Commissioner of a notice in writing stating the name of such person.

Sec. 6. Every person paying the poll tax of another may deduct the same from any indebtedness to such other person. The commissioner must demand payment of poll tax from every person liable therefor, and on the neglect or refusal of such person to pay the same, he must collect by seizure and sale of any personal property owned by such person, and any property thus seized shall be sold as provided by law for the sale of personal property on execution except that three days' notice of the time and place of the sale shall be sufficient.

Sec. 7. It shall be the duty of the commissioner to collect and enforce the collection of all unpaid taxes by giving notice in writing to such delinquent, personally or by mail, and such de-

linquent shall pay a penalty of one dollar in addition to such tax.

Sec. 8. The Territorial Treasurer must, before the first Monday in March in each year, deliver to each commissioner in the Territory of Alaska blank poll tax receipts, in book form with stubs numbered the same as the receipts, of one hundred in each book, a sufficient number [3] for each commissioner. The form of such receipts and stubs shall be prescribed by the Territorial Treasurer and shall be approved by the Governor of the Territory.

Sec. 9. The commissioner shall, before entering upon the performance of his duties as herein prescribed, execute a bond to the Territory of Alaska in the sum to be fixed by the Territorial Treasurer which shall not be less than double the amount of money which will probably come into his hands under this act during any one year. Said bond shall be executed with two or more sureties and the same shall be approved by the Territorial Treasurer; said bond shall be conditioned for the faithful discharge of the duties of his office and the said bond shall be filed in the office of the Territorial Treasurer.

Sec. 10. The commissioner shall keep an accurate account of all moneys received by him under the provisions of this act, and he shall, not later than the first day in September in each year, transmit the same to the Territorial Treasurer. Such statement shall be verified by the affidavit of the commissioner to the effect that

the same is in all respects a full and true statement of all moneys received by him under the provisions of this act; and after the first day of September in each year, the commissioner shall, at least once in three months, file an additional statement setting forth any taxes and penalties collected by him under the provisions of this act during such period of three months, and shall transmit such moneys to the Territorial Treasurer; such supplemental statement shall be made and verified, as herein provided for the first statement.

The commissioner, for services rendered under the provisions of this act, shall receive as full compensation fifteen per centum of all taxes collected, except those collected by action, civil or criminal, and twenty per centum of all delinquent taxes and penalties.

Sec. 11. The Territorial Treasurer shall make and prescribe all rules and regulation to carry into effect the provisions of this act.

Sec. 12. Any person who shall violate any of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be fined in a sum of not more than one hundred dollars nor less than five dollars, or imprisoned in the federal jail for not more than thirty days nor less than one day.

Sec. 13. This bill shall take effect from and after its passage."

IV $\frac{1}{2}$ .

That prior to the third day of July, 1913, there was

no Treasurer in and for the Territory of Alaska.

V.

That the said defendant, on or about the 25th day of July, 1913, caused to be published in the "Daily Alaska Empire," a newspaper published in Juneau, Alaska, a certain notice, which is in words and figures as follows, to wit: [4]

POLL TAX NOTICE.

Notice is hereby given that the poll tax provided for by Chapter 54 of the Session Laws of Alaska, 1913, is due and payable on or before Monday, August 4, 1913, and the same will become delinquent on and after Tuesday, August 5, 1913. All persons are hereby warned to pay said poll tax, viz., \$4.00, on or before August 4, 1913, and that in case of failure so to do a penalty of \$1.00 in addition to said \$4.00 will be required of such persons so delinquent. Any person failing to pay said poll tax on or before Monday, August 4, 1913, will be guilty of a misdemeanor and liable to a fine of from \$5.00 to \$100.00 or imprisonment from one to thirty days.

Payment of said poll tax can be made to the undersigned at his office in the court house at Juneau, Alaska.

(Signed) JOHN B. MARSHALL,  
U. S. Commissioner, Juneau Precinct, First  
Division, District of Alaska.

VI.

That no provision is made in said act or any of the laws of the United States or the laws of the Territory of Alaska for the recovery of taxes illegally levied



and collected and that the defendant herein is attempting and threatening to collect a poll tax from this plaintiff for the year 1913 contrary to the spirit and intention of the act of the Legislature above set forth, and is attempting and threatening to collect said tax as aforesaid from this plaintiff and all others similarly situated who reside within Juneau Precinct, Territory of Alaska, and that the said defendant unless restrained by an order of this Court will proceed to collect this poll tax and threatens to collect the same by proceedings, both civil and criminal. That the defendant has threatened the plaintiff that unless the plaintiff pays to him, the defendant, the alleged poll tax above described for the year 1913 forthwith, he will cause a complaint to be filed against the plaintiff and cause the plaintiff to be arrested and brought before him and adjudged guilty of failing to pay the said poll tax and enter judgment against the plaintiff in the court of the defendant for the alleged violation of said act; [5]

## VII.

That the acts and threatened acts of the said defendant herein complained of are unlawful, invalid and without authority of law for the reason that it appears upon the face of said act that the poll tax in said act provided for and levied is not to be collected during the year 1913 or before the first Monday in April, 1914, for the reason that certain official acts necessary to be done and performed by the said defendant prior to the collection of said tax have not been by him performed, which acts and conditions

precedent towards the collection of said tax are as follows:

a. No list of names of all persons residing within his precinct subject to the tax has been compiled by said defendant prior to March 1, 1913, or at all;

b. That no notice to all persons subject to said tax has been by said defendant given, as provided in said act, prior to the first Monday in April, 1913;

c. That no blank receipts and stubs, as provided for in section 8 of said act, have been delivered by the Treasurer of the Territory of Alaska to said defendant prior to the first Monday in March, 1913;

d. That no bond executed by the defendant to the Territory of Alaska, as provided for by Section 9 of said act, was by said defendant executed and delivered, as in said section provided for, prior to the first Monday in March, 1913;

#### VIII.

That the defendant herein threatens, pursuant to procedure laid down in section 6 of the said act, to take the property of the plaintiff and seize the same and sell the same upon three days' notice, but without any procedure [6] for the condemnation or distraint of the said property and without other process of law, and plaintiff alleges that by reason thereof the plaintiff will be deprived of his property without due process of law, contrary to Section 1, Article 14, of the Constitution of the United States;

#### IX.

That the act above mentioned is void, for the reason that the same is in violation of the Organic Act of the Territory of Alaska (Compiled Laws of

Alaska, page 272, section 418), because the defendant is holding the office of United States Commissioner under appointment from the United States and is also designated as Poll Tax Collector under said Act;

X.

That unless this Court lends to the plaintiff the aid of its writ of injunction, the proceedings herein threatened by the defendant will result in a multiplicity of suits against this plaintiff as well as all others similarly situated;

XI.

That the plaintiff is without plain, speedy and adequate remedy at law, and will suffer great, immediate and irreparable injury, and will be compelled to pay said tax without any method or remedy for the recovery of the same and under duress and threat of imprisonment and trial before the defendant, the same officer who is engaged in the collection of said tax, and will be deprived of his liberty and property without due process of law unless a temporary injunction is issued herein prohibiting the defendant from the acts and threatened acts herein complained of, and unless upon final hearing a final and permanent injunction be granted enjoining the defendant from collecting the said tax. [7]

WHEREFORE plaintiff prays that a temporary restraining order be issued herein restraining the defendant from committing the acts complained of, and that hereafter a temporary injunction be issued during the pendency of this action restraining the defendant from doing the acts complained of herein, and, upon final hearing, a permanent injunction be

granted prohibiting and restraining the defendant from doing the acts complained of and threatened herein, and for such other and further relief as to the Court may seem meet and proper, and for plaintiff's costs and disbursements herein laid out and expended.

SHACKLEFORD & BAYLESS,  
Z. R. CHENEY,

Attorneys for Plaintiff.

United States of America,  
District of Alaska,—ss.

I, Arthur B. Callaham, being first duly sworn, on oath say: That I am the plaintiff in the above-entitled action; that I have read the foregoing complaint and know the contents thereof and believe the same to be true.

A. B. CALLAHAM.

Subscribed and sworn to before me this 4th day of August, 1913.

[Seal]

W. S. BAYLESS,  
Notary Public for Alaska.

My Commission expires Dec. 10, 1913. [8]

*In the District Court for the District of Alaska,  
Division No. 1 at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All  
Male Persons Residents of Juneau Precinct,  
Territory of Alaska, Over the Age of Twenty-  
one Years and Under the Age of Fifty Years,  
Plaintiff,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for  
Juneau Precinct, Territory of Alaska, and  
Ex-officio Collector of Poll Tax,  
Defendant.

**Demurrer.**

The defendant above named hereby *demurrers* to  
the amended complaint of the plaintiff herein upon  
the ground that said amended complaint does not  
state facts sufficient to constitute a cause of action.

J. W. RUSSELL,  
Defendant's Attorney.

[Endorsed]: Filed in the District Court, District  
of Alaska, First Division. Aug. 6, 1913. E. W.  
Pettit, Clerk. By ————, Deputy. [9]



*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All  
Male Persons Residents of Juneau Precinct,  
Territory of Alaska, Over the Age of Twenty-  
one Years and Under the Age of Fifty Years,  
Plaintiff,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for  
Juneau Precinct, Territory of Alaska, and  
Ex-officio Collector of Poll Tax,  
Defendant.

### **Judgment.**

This action having been brought to restrain the defendant from collecting poll tax under Chapter 54 of the laws of 1913; and the defendant having appeared and demurred to the complaint herein; and said demurrer having come on regularly for argument, and argument had thereon; and said demurrer having been duly sustained; and the plaintiff, leave having been granted therefor, having filed his amended complaint herein; and the defendant having duly demurred to such amended complaint; and said demurrer having been duly brought on for argument, and argument had thereon; and said demurrer to said amended complaint having been sustained;

NOW, on motion of J. W. Russell, attorney for the defendant herein;

It is hereby ORDERED, ADJUDGED and DE-

CREED that said amended complaint be and the same hereby is dismissed.

And it is hereby further ORDERED, ADJUDGED and DECREED that the defendant above named have and recover of [10] and from the above-named plaintiff, ARTHUR B. CALLAHAM, his costs and disbursements herein to be taxed.

Dated August 6th, 1913.

FRED M. BROWN,  
Judge.

To which Judgment the plaintiff excepts and his exception is allowed.

FRED M. BROWN,  
Judge.

Entered Court Journal No. J, page 109.

Filed in the District Court, District of Alaska, First Division. Aug. 6, 1913. E. W. Pettit, Clerk. By H. Malone, Deputy.

No. 1019-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Arthur B. Callaham, for Himself, etc., Plaintiff, vs. John B. Marshall, as, etc., Defendant. Judgment. J. W. Russell, Defendant's Attorney, Juneau, Alaska. [11]

*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All  
Male Persons Residents of Juneau Precinct,  
Territory of Alaska, Over the Age of Twenty-  
one Years and Under the Age of Fifty Years,  
Plaintiff,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for  
Juneau Precinct, Territory of Alaska, and  
Ex-officio Collector of Poll Tax,  
Defendant.

**Petition for Appeal.**

Comes now the above-named plaintiff and appellant, Arthur B. Callaham, and conceiving himself aggrieved by the judgment of this Court entered on the 6th day of August, 1913, sustaining the demurrer to plaintiff's amended complaint and ordering the same dismissed at plaintiff's costs, hereby petitions said Court for an order allowing this plaintiff and appellant to prosecute an appeal from said judgment to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit at Seattle, Washington, under and according to the laws of the United States in that behalf made and provided, and that an order be made fixing the amount of security which said plaintiff and appellant shall give upon said appeal, and that a transcript of the record, proceedings and papers upon which said judgment was made,

duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that said appeal be heard at the next term of said Court at Seattle, State of Washington.

Dated August 8, 1913.

SHACKLEFORD & BAYLESS,

Z. R. CHENEY,

Attorneys for Plaintiff and Appellant.

**[Order Granting Petition for Appeal.]**

The foregoing petition for appeal is granted and the [12] claim of appeal herein made is allowed.

Dated August 8th, 1913.

FRED M. BROWN,

Judge.

Due service of a copy of the within is admitted this 8th day of August, 1913.

J. W. RUSSELL.

Attorney for Defendant.

Filed in the District Court, District of Alaska, First Division. Aug. 8, 1913. E. W. Pettit, Clerk. By \_\_\_\_\_, Deputy.

[Endorsed]: Original No. 1019-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Arthur B. Callaham, et al., Plaintiffs, vs. John B. Marshall, as U. S. Commissioner, etc., Defendant. Petition for Appeal. Shackelford & Bayless, Attorneys for Plaintiff. Office, Juneau, Alaska.

[13]

*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All  
Male Persons Residents of Juneau Precinct,  
Territory of Alaska, Over the Age of Twenty-  
one Years and Under the Age of Fifty Years,  
Plaintiff,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for  
Juneau Precinct, Territory of Alaska, and  
Ex-officio Collector of Poll Tax,  
Defendant.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS,  
that we, Arthur B. Callaham, as principal, and  
Henry Shattuck, as surety, are held and firmly bound  
unto John B. Marshall, as U. S. Commissioner for  
Juneau Precinct, Territory of Alaska, and Ex-Officio  
Collector of Poll Tax, jointly and severally, in the  
sum of two hundred and fifty dollars (\$250.00), to be  
paid to the said John B. Marshall, as U. S. Commis-  
sioner for Juneau Precinct, Territory of Alaska, and  
Ex-officio Collector of Poll Tax, his successors or  
assigns, to which payment, well and truly to be made,  
we bind ourselves, our heirs, executors and adminis-  
trators, jointly and severally, firmly by these pres-  
ents.

Sealed with our seals and dated this 8th day of  
August, 1913.

Whereas, lately at the session of the District Court



for the District of Alaska, Division No. 1, at Juneau, in a suit pending in said court between Arthur B. Callaham, for himself and all male persons residents of Juneau Precinct, [14] Territory of Alaska, over the age of twenty-one years and under the age of fifty years, plaintiff and appellant, and John B. Marshall, as U. S. Commissioner for Juneau Precinct, Territory of Alaska and Ex-Officio Collector of Poll Tax, defendant and appellee, a judgment and decree was rendered against the said plaintiff on the 6th day of August, 1913, wherein and whereby it was ordered, adjudged and decreed that the demurrer of said defendant to the amended complaint of the plaintiff herein be sustained and the said amended complaint dismissed at plaintiff's costs; that said plaintiff and appellant having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the said judgment and decree, and a citation directed to the said defendant and appellee having been issued citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at Seattle, Washington;

Now, the condition of the above obligation is such, that if the said Arthur B. Callaham shall prosecute said appeal to effect, and shall answer all damages and costs that may be awarded against him if he fails to make his appeal good, then this obligation to be

void; otherwise to remain in full force and effect.

ARTHUR B. CALLAHAM,  
Plaintiff and Appellant.  
HENRY SHATTUCK,  
Surety.

Sufficiency of sureties on foregoing bond approved  
this 9th day of August, 1913.

FRED M. BROWN,  
Judge. [15]

United States of America,  
District of Alaska,—ss.

Henry Shattuck, being first duly sworn, deposes  
and says: That he is a resident of the town of Juneau,  
District of Alaska, and is not a counsellor, attorney,  
marshal, clerk of any court, or other officer of any  
court; that he is worth the sum of five hundred dol-  
lars, exclusive of property exempt from execution  
and over and above all just debts and liabilities.

HENRY SHATTUCK.

Subscribed and sworn to before me this 8th day of  
August, 1913.

W. S. BAYLESS,  
Notary Public for Alaska.

My Commission expires Dec. 10, 1913.

Original. No. ——. Filed in the District Court,  
District of Alaska, First Division. Aug. 9, 1913. E.  
W. Pettit, Clerk. By H. Malone, Deputy.

In the District Court for the District of Alaska,  
Division No. 1, at Juneau, Arthur B. Callaham  
et al., Plaintiffs, vs. John B. Marshall, as U. S. Com-  
missioner, etc., Defendant. Bond on Appeal.

Shackleford & Bayless, Attorneys for Plaintiff.  
Office, Juneau, Alaska. [16]

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*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All  
Male Persons Residents of Juneau Precinct,  
Territory of Alaska, Over the Age of Twenty-  
one Years and Under the Age of Fifty Years,  
Plaintiff,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for  
Juneau Precinct, Territory of Alaska, and  
Ex-officio Collector of Poll Tax,  
Defendant.

**Order Settling Record on Appeal.**

This matter coming on for hearing on the 6th day of August, 1913, upon the amended complaint of the plaintiff herein, and the defendant having filed a demurrer to said amended complaint, and the Court having on said date sustained said demurrer and having entered judgment thereon dismissing said amended complaint at plaintiff's costs, which said pleadings constitute a full, true and correct transcript of the records, files and proceedings of said Court in said cause, and all of which are on file with the Clerk of the District Court for the District of Alaska, Division No. 1, at Juneau;

IT IS ORDERED that all of the said pleadings, to wit, the amended complaint, demurrer and judg-

ment, be and they are hereby made the record in this cause.

AND IT IS FURTHER ORDERED that a copy of all of said papers be certified to by the Clerk of this Court to the United States Circuit Court of Appeals for the Ninth Circuit, at Seattle, as the record in this cause, and transmitted to the Clerk of the United States Circuit Court of Appeals for [17] the Ninth Circuit under proper certificate, and that all of said records and papers be and constitute the record upon appeal herein from the said judgment.

FRED M. BROWN,

Judge.

[Endorsed]: Original. No. 1019-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Arthur B. Callaham et al., Plaintiffs, vs. John B. Marshall, as U. S. Commissioner, etc., Defendant. Order Settling Record for Appeal. Shackelford & Bayless, Attorneys for Plaintiff. Office, Juneau, Alaska.

Filed in the District Court, District of Alaska, First Division. Aug. 8, 1913. E. W. Pettit, Clerk. By ————, Deputy. [18]

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

ARTHUR B. CALLAHAM, for Himself and All  
Male Persons Residents of Juneau Precinct,  
Territory of Alaska, Over the Age of Twenty-  
one Years and Under the Age of Fifty Years,  
Appellant,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for  
Juneau Precinct, Territory of Alaska, and  
Ex-officio Collector of Poll Tax,

Appellee.

**Citation [on Appeal (Original)].**

United States of America,

District of Alaska,—ss.

The President of the United States of America to  
John B. Marshall, as U. S. Commissioner for  
Juneau Precinct, Territory of Alaska, and Ex-  
officio Collector of Poll Tax, and to J. W. Rus-  
sell, Esq., Attorney for said Party:

You are hereby cited and admonished to be and  
appear at the United States Circuit Court of Ap-  
peals for the Ninth Circuit, to be held at the city of  
Seattle, in the State of Washington, within thirty  
(30) days from the date of this writ, pursuant to an  
appeal filed in the Clerk's office of the District Court  
for the District of Alaska, Division No. 1, wherein  
the appellant and plaintiff above named, Arthur B.  
Callaham, is appellant and you are the appellee, to  
show cause, if any there be, why judgment in said  
appeal mentioned should not be corrected and speedy  
justice should not be done to the parties in that be-  
half. [19]

WITNESS the Honorable EDWIN DOUGLASS  
WHITE, Chief Justice of the Supreme Court of the



United States, this 8th day of August, 1913.

FRED M. BROWN,  
Judge of the District Court for the District of  
Alaska, Division No. 1.

Attest: E. W. PETTIT,  
Clerk of the District Court for the District of Alaska,  
Division No. 1. [20]

Due service of a copy of the within Citation is admitted this 8th day of August, 1913.

J. W. RUSSELL,  
Attorney for Defendant and Appellee.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Aug 8, 1913. E. W. Pettit, Clerk. By ———, Deputy. [21]

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*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All  
Male Persons Residents of Juneau Precinct,  
Territory of Alaska, Over the Age of Twenty-  
one Years and Under the Age of Fifty Years,  
Plaintiff,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for  
Juneau Precinct, Territory of Alaska, and  
Ex-officio Collector of Poll Tax,  
Defendant.

**Assignment of Errors.**

Comes now the plaintiff, Arthur B. Callaham, in

the above-entitled action, and assigns the following errors as having been committed by the Court herein upon which he relies, and will rely, upon his appeal from the judgment made and entered by this Honorable Court on the 6th day of August, 1913:

1. The Court erred in sustaining the demurrer to the amended complaint;

2. The Court erred in rendering judgment against the plaintiff herein and in dismissing plaintiff's amended complaint.

SHACKLEFORD & BAYLESS,  
Z. R. CHENEY,

Attorneys for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Aug. 8, 1913. E. W. Pettit, Clerk. No. 1019-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Arthur B. Callaham et al., Plaintiffs, vs. John B. Marshall, as U. S. Commissioner, etc., Defendant. Assignment of Errors. Shackleford & Bayless, Attorneys for Plaintiff. Office, Juneau, Alaska.

Due service of a copy of the within is admitted this 8th day of August, 1913.

J. W. RUSSELL,  
Attorney for Deft. [22]

*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All  
Male Persons Residents of Juneau Precinct,  
Territory of Alaska, Over the Age of Twenty-  
one Years and Under the Age of Fifty Years,  
Plaintiff,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for  
Juneau Precinct, Territory of Alaska, and  
Ex-officio Collector of Poll Tax,  
Defendant.

**Praeceptum for Transcript on Appeal.**

Juneau, Alaska, August 8, 1913.

Clerk, District Court for the District of Alaska,  
Division No. 1, Juneau, Alaska.

Dear Sir:

Please prepare the transcript of the record for appeal in the case of Arthur B. Callaham, for Himself and All Male Persons Residents of Juneau Precinct, Territory of Alaska, Over the Age of Twenty-one Years and Under the Age of Fifty Years, vs. John B. Marshall, as U. S. Commissioner for Juneau Precinct, Territory of Alaska, and Ex-officio Collector of Poll Tax, Cause No. 1019-A, in the District Court, and certify the following papers, to wit:

1. Amended Complaint.
2. Demurrer to Amended Complaint.
3. Judgment.

4. Petition for Appeal.
5. Order Allowing Appeal.
6. Appeal Bond.
7. Order Confirming Settlement of Record on Appeal.
8. Citation.
9. Assignment of Errors.

When so prepared you will kindly transmit this record to the Clerk of the United States Circuit Court of Appeals [23] for the Ninth Circuit.

SHACKLEFORD & BAYLESS,  
Z. R. CHENEY,

Attorneys for Plaintiff and Appellant.

Filed in the District Court, District of Alaska, First Division. Aug. 8, 1913, E. W. Pettit, Clerk. In the District Court for the District of Alaska, Division No. 1, at Juneau. Arthur B. Callaham et al., Plaintiffs, vs. John B. Marshall, as U. S. Commissioner, etc., Defendant. Praeipe for Transcript on Appeal. Shackleford & Bayless, Attorneys for Plaintiff. Office, Juneau, Alaska. [24]

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*In the District Court for the District of Alaska, Div.  
No. 1, at Juneau.*

No. 1019—A.

ARTHUR B. CALLAHAM, for Himself and All  
Male Persons Residents of Juneau Precinct,  
Territory of Alaska, Over the Age of Twenty-  
one Years and Under the Age of Fifty Years,  
Plaintiff and Appellant,

vs.

JOHN B. MARSHALL, as U. S. Commissioner for  
Juneau Precinct, Territory of Alaska, and  
Ex-officio Collector of Poll Tax,  
Defendant and Appellee.

**Certificate [of Clerk U. S. District Court to  
Transcript of Record, etc.].**

I, E. W. Pettit, Clerk of the District Court for the District of Alaska, Division Number One, do hereby certify that the foregoing and hereto attached twenty-four pages of typewritten matter, numbered from one to twenty-four, both numbers inclusive, constitute a full, true and correct copy of the record, and the whole thereof, prepared in accordance with the praecept of the appellant, filed herein and made a part hereof, in cause No. 1019-A, entitled Arthur B. Callaham, for himself and all male persons residents of Juneau Precinct, Territory of Alaska, over the age of twenty-one years and under the age of fifty years, plaintiff and appellant, vs. John B. Marshall, as U. S. Commissioner for Juneau Precinct, Territory of Alaska, and Ex-officio Collector of Poll Tax, Defendant and Appellee.

I do further certify that the said record is by virtue of order allowing appeal and the citation issued herein and made a part hereof, and the return in accordance therewith.

I do certify that the said record has been prepared by me in my office, and the costs of preparation, examination and certificate amounting to Eleven and 60/100 dollars (\$11.60) will be paid by Messrs. Shackleford & Bayless, counsel for the plaintiff [25] and appellant.



IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the above-entitled court this ninth day of August, nineteen hundred and thirteen.

[Seal]

E. W. PETTIT,

Clerk of the District Court for the District of Alaska,  
Division Number One. [26]

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[Endorsed]: No. 2305. United States Circuit Court of Appeals for the Ninth Circuit. Arthur B. Callaham, for Himself and All Male Persons Residents of Juneau Precinct, Territory of Alaska, Over the Age of Twenty-one Years and Under the Age of Fifty Years, Appellant, vs. John B. Marshall, as U. S. Commissioner for Juneau Precinct, Territory of Alaska, and Ex-officio Collector of Poll Tax, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Division No. 1.

Received and filed August 18, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.



IN THE  
**UNITED STATES CIRCUIT COURT  
OF APPEALS**  
FOR THE NINTH CIRCUIT

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ARTHUR B. CALLAHAM,  
Plaintiff in Error,  
vs.

UNITED STATES OF AMERICA,  
Defendant in Error.

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ARTHUR B. CALLAHAM for him-  
self and all Male Residents of Ju-  
neau Precinct,  
Appellant,  
vs.

JOHN B. MARSHALL, as United  
States Commissioner for the Ju-  
neau Precinct and Ex-officio Col-  
lector of Poll Tax,  
Apellee.

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**BRIEF OF APPELLANT AND PLAINTIFF IN ERROR**

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STATEMENT OF CASE

The two causes above entitled involve the same questions with reference to the validity of the attempted collection of poll tax in the Territory of Alaska for the year 1913, and for this reason the

brief herein has been entitled in both cases and the same brief filed in both of the causes above entitled. The case of Callaham against Marshall arose through injunction proceedings, seeking to enjoin the collection of the poll tax. The complaint in the case was demurred to by the defendant and the demurrer sustained, and judgment entered against the plaintiff, Callaham, and an appeal taken to this Court. The case of Callaham, Plaintiff in Error, vs. United States of America, Defendant in Error, arose from a criminal information filed in the District Court for the District of Alaska, charging Callaham with the crime of wilfully and feloniously failing to pay his poll tax; to this information or complaint the defendant Callaham demurred and the demurrer was overruled and a judgment entered against Callaham. Pursuant to Section 97 of the Code of Criminal Procedure for the District of Alaska, Callaham sued out his writ of error.

The necessity of contesting the poll tax law within a short time gave rise to an order from the District Court setting the cases for disposition by the Circuit Court of Appeals at its next Seattle session. The short time allowed in which to bring this matter to issue at the Seattle session has compelled the plaintiff in error and appellant to write his brief before the printed record has reached him, but the record is so short that references to the pages of the record have been omitted; in each case the original pleadings, demurrer and judgment being the only matters of record before the lower court.

## SPECIFICATION OF ERRORS

First: The lower court erred in overruling the demurrer of the defendant (a) to the complaint in the injunction case; (b), to the complaint or criminal information in the criminal case.

Second: The court erred in giving and entering judgment against the defendant upon the record herein (a) in the injunction case; (b), in the criminal case.



## BRIEF AND ARGUMENT

The specification of errors above set forth raises two questions: first, that the poll tax law passed by the first legislature for the Territory of Alaska, approved May 1, 1913, violates the organic act providing for a legislature for the Territory of Alaska in that it provides for the levy and collection of the tax by the United States Commissioner, who is "a person who is holding a commission or appointment under the United States" and who, by the provisions of the poll tax act, holds an "office under the government of the Territory" of Alaska. The second proposition involved in these two cases is that the poll tax act, approved May 1, 1913, passed by the territorial legislature, provides for an annual tax which should be levied upon the first of March of each year in accordance with the provisions set forth in the said poll tax act, and that, therefore, the act did not contemplate the collection of said tax until after the first of March, 1914.

THE DESIGNATION OF UNITED STATES COMMISSIONERS AS POLL TAX COLLECTORS IS IN VIOLATION OF THE ORGANIC ACT PROVIDING FOR A LEGISLATURE FOR THE DISTRICT OF ALASKA.

When Congress provided for a legislative assembly for the District of Alaska, it placed certain limitations upon the power of that assembly, and, anticipating a probable tendency on the part of the legisla-

ture to impose additional duties upon the officers who had held their offices by virtue of congressional acts and anticipating the probable incompatibility of such duties, Congress provided by Section 11 of the organic act (37 Statutes at Large, page 512) that:

“No person holding a commission or appointment under the United States \* \* \* \* \* shall hold any office under the government of said Territory.”

Among the various definitions of “office” which have been given by the authorities and which are collected in 29 Cyc. 1361-1364, are the following:

“A duty, charge or trust; a place of trust; a position to which certain duties are attached; a right and correspondent duty to execute a public or private trust and to take the emoluments belonging to it; a right to exercise a public or private employment and to take the fees and emoluments thereunto belonging, whether public, as those of magistrates, or private, as those of bailiffs, receiver, and the like; \* \* \* a position or appointment entailing certain rights and duties; \* \* \* a post, the possession of which imposes certain duties on the possessor, and confers authority for their performance; a position or station in which a person is employed to perform certain duties, or by virtue of which he becomes charged with the performance of certain duties, public or private; a right to exercise a public function or employment, and to take the fees and emoluments belonging to it; \* \* \* a particular duty, charge or trust, conferred by public authority and for public purpose. In a stricter legal sense an employment on behalf of the government in any station or public trust, not merely transient, occasional, or incidental; a public station or employment conferred by the appointment of government; a right and duty confer-

red on an individual to perform any part of the function of government, and receive such compensation, if any, as the law has fixed to the service; a public position, to which a portion of the sovereignty of a country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public; an appointment or authority on behalf of the government to perform certain duties; \* \* a special duty, trust, or charge, conferred by authority, and for a public purpose.”

From the foregoing definitions it is apparent that the Legislature has conferred upon the commissioners “a special duty, trust or charge” in prescribing that they shall collect poll taxes. Therefore, they have conferred upon the commissioners public offices. The fact that no particular name has been applied by the legislature to the persons designated to collect poll taxes is immaterial. The commissioners have been made collectors of poll taxes just as fully and truly as if the persons chosen to perform that duty were by the act specifically designated “collectors of poll taxes.” The office, namely, “the special duty, trust or charge”, has been created, and the commissioners have been chosen to perform the same; indeed, section 9 of the act explicitly recognizes the duty or charge laid by this act upon the commissioner as an office, for it provides that the commissioner before entering upon his duties shall give a bond “conditioned for the faithful discharge of the duties of his office”.

In *Shelby v. Alcorn*, 36 Miss. 273, the question arose whether under a statute similar to Section 11

of our organic act a person who held the office of senator in that state was eligible to the office of levee commissioner of a county in the state; and among other things the Court said:

“The law itself provides that the levee commissioner shall hold his office for the term of two years, under such restrictions as are herein prescribed. He is required to give bonds, and to discharge the duties of treasurer, in which position he is entitled to receive large sums of public money. The board of police, under the report of the levee commissioner as to the cost of the work to be done, is required to levy a sufficient tax to meet it; and he is required to take an oath ‘that he will in all things touching his office, seek to promote the best interests of his county and the State of Mississippi.’ These directions, of themselves, without doubt, define the character of the place of levee commissioner, and determine it to be an office.”

And this case is quoted with approval in *Attorney General v. Common Council* (Mich.) 70 N. W. 450, 452. And in 29 Cyc. 1386, it is said:

“One of the usual necessary formalities for the qualification of an officer is the taking of the official oath. One who is appointed or elected to office and does not take the required official oath does not possess the legal title to the office.”

And again it is said:

“An official bond is an obligation with sureties given by a public officer as security for the faithful discharge of the duties of his office, or, as the term is used in statutes, the bond of a public officer. Generally the filing of the official bond is like the taking of the official oath regarded as a necessary prerequi-

site to the full legal title to the office. In the absence of a contrary statutory provision a person holding two separate offices must give two separate official bonds."

And in the same place it is said:

"The fact that the legislature imposes new duties upon an officer will not require him to take a new oath of office."

Therefore, it is manifest that the legislature itself considered the position of collector of poll taxes as an office, for it exacted a bond from the commissioner for the faithful performance of the duties of poll tax collector and clearly, under the authorities, the legislature correctly deemed the position an office—a new office; for if it had considered that the statute merely imposed new duties on the commissioner the legislature would not have exacted a new and separate bond.

The poll tax act is copied in full in the complaint in the injunction case and reference is made to the same for the purpose of ascertaining the provisions of the act. Section 9 of the act provides that the commissioner shall give a bond to the Territory of Alaska "for the faithful discharge of the duties of his office"; Section 10 provides that the commissioner shall keep an accurate account of all moneys received by him under the provisions of the poll tax act and receive as full compensation 15 per centum of all taxes collected.

It is plain to be seen that the provisions of this



act imposed upon the commissioner new duties not contemplated by the acts of Congress which had created the office of United States Commissioner many years before; that he was accountable not to the United States for the performance of these duties, but to the Territory and its officers alone.

The act of May 17, 1884, (23 Stat. L. p. 24), providing for civil government in the District of Alaska, Sec. 5, provided:

“There shall be appointed by the President four commissioners in and for said District, who shall have the jurisdiction and powers of commissioners of the United circuit courts in any part of said District.”

The act of Congress of June 6, 1900, making further provisions for civil government in Alaska, Sec. 6, provided:

“The respective judges of the court shall appoint and at their pleasure remove clerks, and commissioners in and for the District \* \* \* \* \* The commissioners shall be ex-officio, justices of the peace, recorders, and probate judges.”

At the time of the passage of the act providing for the organization of the first territorial legislature it is self evident that any commissioner in the District of Alaska was a “person holding a commission or appointment under the United States.” The commissioners were the creations of the acts of Congress relating to Alaska, and were appointed by the United States judges, who were also creations of the

acts of Congress relating to Alaska and represented the United States in the Territory of Alaska and were accountable only to the United States. If the persons who held office under these organic acts were not persons "holding a commission or appointment under the United States", then there were no persons in the District holding commissions or appointments under the United States. All of the active duties connected with the levy and collection of this tax under the poll tax act were imposed upon the United States commissioners, and the result is that we have an act of the territorial legislature which, first, compensates the commissioners with fifteen per centum of all taxes collected and gives them a personal interest in the collection of all the taxes, which provides that they shall give such notices and take such action toward the distraint of property as shall end in the collection of the tax; and which makes it a crime to violate the provisions of the act levying the tax. The result, therefore, is that the United States commissioner occupies the position of tax collector for the Territory, is called upon to exercise the duties of a constable or marshal in seeing that the tax is collected, and finally, by reason of the criminal jurisdiction of the United States commissioner, he is made a judge of the guilt or innocence of any person who is charged with failing to pay his poll tax when at the same time he has a pecuniary interest in the collection of the tax. In addition to the duplicity of offices prohibited by Sec. 11 of the organic act providing for a territorial legislature, we

have also an incompatibility of offices which is in violation of the common law. By the act of Congress of June 6, 1900, 31 Stat. L. 321, 552, carried into Carter's Code, Part V., Sec. 567, and Compiled Laws of Alaska, Sec. 796, it is provided:

“So much of the common law as is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be passed by the Congress is adopted and declared to be law within the District of Alaska.”

And at the common law two incompatible offices could not be held by the same person. The assumption of the second constituted and was ipso facto a vacation of the first office. The office of commissioner is incompatible with that of poll tax collector. For the commissionership is a judicial office and the poll tax collectorship is an executive office. If a person fails to pay his poll tax, the collector “must collect by seizure and sale of any personal property owned by such person, and any personal property thus seized shall be sold as provided by law for the sale of personal property in execution, except that three days’ notice of the time and place of sale shall be sufficient.” (Sec. 6.) Thus the collector is given the duties of a marshal—executive duties—to perform. And Section 12 makes any violation of the provisions of the act a misdemeanor. Therefore a failure to pay the tax would be a crime punishable in the court of the commissioner as *ex-officio* justice of the peace, i. e. the commissioner would be both the private prosecutor and the judge, for he would

naturally be the person who must swear to the complaint charging failure to pay the tax. Therefore we have this predicament: The commissoiner as executive officer demands the tax; payment is refused; as executive officer he makes and swears to a complaint before himself as a judicial officer and, conversely, as judicial officer he listens to himself as private prosecutor; and as judicial officer he tries the accused. He is at one and the same time and in the same proceeding private prosecutor, witness and judge. In effect he is a party in the case and the judge of his own case. Could two offices be more violently antagonistic and incompatible?

In *State v. Goff* (R. I.) 9 Atl. 226, 227, it is said:

“The test of incompatibility is the character and relation of the offices, as where one is subordinate to the other, and subject, in some degree to its revisory power; or where the functions of the two offices are inherently inconsistent and repugnant. In such cases it has uniformly been held that the same person cannot hold both offices. In *Rex v. Pateman*, 2 Term R. 777, it was declared that, where a town clerk acts ministerially under the aldermen, who are judicial officers, one cannot hold both offices. Much stress is laid upon the fact that the accounts of the clerk were subject to the revision and control of the aldermen. *Rex. v. Tizzard*, 9 Barn. & C. 418, is to the same effect. In *Cotton v. Phillips*, 56 N. H. 220, where one was chosen a member of the prudential committee and also an auditor in a school district, it was held he could not hold both offices. The court says: ‘If the same person could hold both offices, he would in fact sit in judgment on his own acts.’ In England a sheriff’s duties are ministerial, and, to a limited extent, also judicial. While these



peculiar functions are recognized, in some cases, as being necessarily imposed upon the office by legislation and custom, no case upholds the propriety of exercising both the ministerial and judicial functions at the same time and in the same case. *Widow v. Clerks*, 1 Cro. Eliz. 76, case 38. \* \* \*

“Under our law there is no such confusion of duties. In this state, and doubtless in this country generally, a sheriff is simply a ministerial officer. If he performs judicial duties, it is by virtue of another office voluntarily assumed. But the incongruity of such offices in one person is manifest. To say nothing of the breach of dignity and propriety which would result from an attempt to perform the duties of judge and officer together, the power of a judge to pass upon the sufficiency of an officer’s return, and to allow or disallow his fees, are quite sufficient to bring these offices within the recognized rule of incompatibility, by reason of the judicial supervision of one office and the accountability of the other. Moreover, in this state, an officer is required to serve any process duly tendered to him, and thus a judge of a district court might have the process of his own court tendered to him to be served, and become liable to a penalty if he did not do it. In many cases he is the complaining officer, whose complaint could only be made by himself, if he were also judge, unless aided by special legislation.

\* \* \* “We think the offices of justice of a district court and deputy sheriff are incompatible, and that, by accepting the latter, the respondent vacated the former.”

The same view was held in the case of *Stubbs v. Lee*, (Me.) 18 Am. Rep. 251, where the court said:

“The defendant having been appointed and sworn as a deputy-sheriff must be regarded as having accepted that office. By that acceptance he sur-



rendered the office of trial justice, a judicial office incompatible with that of a deputy-sheriff. His judicial authority, therefore, as a trial justice was at an end."

In his work on Public Officers, Mr. Mecham says, Sec. 422:

"Incompatibility which shall operate to vacate the first office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both."

And among the offices which he says the authorities have held to be incompatible, so that an acceptance of the second vacates the first, are the following: town clerk and alderman; trial justice and deputy-sheriff; justice of the peace and constable; justice of the peace and sheriff or deputy-sheriff; member of a prudential committee and auditor of a school district; state solicitor and member of congress, city alderman and city marshal; postmaster and judge of the county court.

We submit, therefore, that the poll tax act, which imposes all of the active and important duties of the collection of poll tax upon the United States commissioner, is void for the reason that it overrides the restrictions placed by Congress upon the territorial legislature and violates the principles of the common law.

SECOND: THE ACT OF THE ALASKA LEGISLATURE, PROVIDING FOR THE COLLECTION OF A POLL TAX IN THE TERRITORY, APPROVED MAY 1, 1913, DID NOT CON-

## TEMPLATE THE COLLECTION OF A POLL TAX PRIOR TO THE YEAR COMMENCING MARCH 1, 1914.

The record in this case has been made up pro forma for the purpose of testing this law before the Circuit of Appeals we assume upon the theory that it was the duty of the District Court for the District of Alaska to sustain the law in favor of the contention of the tax collector and force the burden of the appeal upon the person protesting against the tax. There is nothing in the record to enlighten this Court or counsel for the plaintiff in error and appellant upon what ground the lower court proceeded in holding that it was a crime to refuse to pay a poll tax before March 1, 1914, and in holding that the tax was collectible prior to that date; and we are at a loss, therefore, to present any authorities except references to the provisions of the act itself, and we are unable to reach any other conclusion than that the legislature had no intention whatever of collecting the tax until the fiscal year provided in the act, commencing March 1st, 1914. In the first place, the act of Congress approved August 24, 1912, creating a legislative assembly in the Territory of Alaska (37 Stat. L. p. 512) provided that the first meeting of the legislative assembly should convene at the City of Juneau on the first Monday in March, 1913. Any act, therefore, which provided for the performance of certain essential duties prior to the first day of any month of March could not have been introduced

except with the intent that these duties could not be performed until the first day of March, 1914, for the reason that the first Monday in March, 1913, was the third day of March, 1913, and no member of the territorial legislature could have introduced an act (where the same contemplated the doing of certain things prior to any month of March) with the intention of the same having effect prior to the first day of March, 1914, for the reason that the legislature could not have been called to order until the third day of March, 1913. In view of this condition of affairs let us examine the poll tax act. Sec. 1 of the act provides:

“Section 1. That there is hereby made, imposed and levied upon each male person, except soldiers, sailors in the United States navy or revenue cutter service, volunteer firemen, paupers, insane persons, or territorial charges, within the Territory of Alaska or the waters thereof, over the age of twenty-one years, and under the age of fifty years, an annual tax in the sum of four dollars to be paid and collected in the manner provided in the following sections of this act.”

Section 2 then proceeds to provide the method of collecting the tax and is to be construed in the light of the well known rule of constitutional law that “due process requires that the person assessed have notice or an opportunity to be heard at some time before the charge becomes fixed and absolute against him”. 8 Cyc, page 1134. Let us see then what the following section provides:

“Sec. 2. That the commissioner of each precinct

in the Territory of Alaska, shall, on or before the first day of March in each year, set down upon such blanks as the Treasurer of the Territory of Alaska may prescribe, the names of all persons residing within his precinct subject to the tax herein provided for; one of such blanks shall be transmitted by the commissioner to the Treasurer of the Territory and the other shall be retained by him. At the time of transmitting one copy of said duplicate list of names of the persons subject to the tax herein provided for within his precinct, the commissioner shall cause to be published in at least one newspaper of general circulation published within his precinct or if there be no newspaper then by posting in five public places within his precinct a notice setting forth that the poll tax provided for in this act is due and payable between certain dates and that the payment thereof will become delinquent as provided in this act, and warning all persons to pay the same, and that in case of failure to pay the same, penalties, as herein provided for, will be imposed and it shall be the duty of every person liable to pay such tax, to pay the same to the commissioner within the time in which such notice specifies.”

It is the evident intention from the section above quoted that the legislature contemplated that a roll of the persons subject to the poll tax should be made up before the first of March of each year, in duplicate, one to remain in the possession of the tax collector, and one to be transmitted to the Treasurer of the Territory; that this roll with reference to this particular tax was intended to take the place of and to be similar to the ordinary assessment rolls and made up so as to give due notice to any person inquiring as to whether he had been included in the assessment of the poll tax. It provided two offices in

which the persons levied upon would find their names and provided for a published notice which would put all persons upon inquiry as to whether they were included in the levy. It contemplated that the levy should apply only to persons residing in the District. Section 3 of the act provided:

“Sec. 3. The tax herein provided for shall be paid between the first Monday in April and the first Monday in the month of August in each year.”

It is to be remembered that the act became a law on the first day of May, 1913, and that the legislature could not have contemplated the payment of the tax during the month of April, 1913. Section 8 of the act provides as follows:

“The Territorial Treasurer must, before the first Monday in March of each year, deliver to each commissioner in the Territory of Alaska blank poll tax receipts.”

For the purposes of this record we assume that it is admitted that there was no Territorial Treasurer in the Territory of Alaska until the third day of July, 1913, as the allegations in the injunction case are undenied. Furthermore it may be deduced from the statutes of the United States referring to the District of Alaska that no Territorial Treasurer could exist prior to the third day of March, 1913; so that one of the prerequisites to the collection of this tax being the making up of a roll in each of the precincts before the first of March of each year, could not have been complied with and THE ATTEMPT



## TO COLLECT THE TAX FOR THE YEAR 1913 COULD NOT POSSIBLY BE VALID.

“A levy cannot be based upon a list or roll not made until after the levy, although in the same year.” 37 Cyc., page 974.

“A statutory provision that the tax levy shall be made at a certain time of the year, or between certain dates, is generally held to be mandatory, so that a levy made at any other time is invalid.” 37 Cyc., page 975.

In view of these well known principles and in view of the evident intention of the territorial legislature to provide a systematic and formal way of collecting the tax by the performance of certain acts which could not occur until shortly prior to the first day of March, 1914, we submit that there is no ground whatever upon which to base the attempted collection of the tax or criminal prosecution of the plaintiff in error during the year 1913.

The only argument that has been advanced so far to sustain the validity of the attempted collection of the tax for the year 1913 is that of public necessity. The provisions of the act are so plain themselves that it would be nothing more or less than judicial legislation to hold that a poll tax could be collected before the first of March 1914. To say that on or about the first of May, 1913, the Alaska legislature intended to levy a tax for 1913 by the provisions of this act would be charging a body of intelligent men with giving no expression, indeed, to their intention.

It was within the power of the legislature to

have changed the date for the making up of the rolls to the first of July, 1913, or to any other date subsequent to the passage of the act, which would have made such intention clear and unequivocal. To ask that the courts hold that such intention is clear, namely, to levy a tax for the year 1913, is, we respectfully submit, an unwarranted request or tax upon the imagination of the courts.

Respectfully submitted,

ARTHUR B. CALLAHAM,

*In propria personam.*

LEWIS P. SHACKLEFORD,

Z. R. CHENEY,

W. S. BAYLESS,

Attorneys for Plaintiff in Error  
and Appellant.

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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ARTHUR B. CALLAHAM,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court  
of the District of Alaska,  
Division No. 1.

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**FILED**

AUG 28 1913



No. 2308

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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ARTHUR B. CALLAHAM,  
Plaintiff in Error,  
vs.

UNITED STATES OF AMERICA,  
Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court  
of the District of Alaska,  
Division No. 1.

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# INDEX OF PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Assignment of Errors .....	12
Attorneys, Names and Addresses of.....	1
Bond on Writ of Error .....	13
Certificate of Clerk U. S. District Court to Trans- cript of Record, etc.....	16
Citation on Writ of Error (Original) .....	10
Complaint .....	1
Demurrer.....	4
Judgment and Sentence .....	5
Names and Addresses of Attorneys .....	1
Order Allowing Writ of Error, etc.....	8
Petition for Writ of Error and Order Allowing Same .....	7
Praecept for Transcript of Record .....	15
Writ of Error (Original) .....	8



**[Names and Addresses of Attorneys.]**

*In the District Court for the District of Alaska,  
Division Number One, at Juneau.*

No. 930—B.

UNITED STATES OF AMERICA,

Plaintiff and Defendant in Error,

vs.

ARTHUR B. CALLAHAM,

Defendant and Plaintiff in Error.

J. W. RUSSELL, Juneau, Alaska, Attorney for  
Plaintiff and Defendant in Error.

SHACKLEFORD & BAYLESS and Z. R.  
CHENEY, Juneau, Alaska, Attorneys for De-  
fendant and Plaintiff in Error.

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*In the District Court for the District of Alaska,  
Division No. 1.*

Before the Hon. FRED M. BROWN, District Judge,  
Sitting as a Magistrate.

UNITED STATES OF AMERICA

vs.

ARTHUR B. CALLAHAM.

**Complaint.**

Chapter 54, Laws of Alaska, 1913.

The defendant, Arthur B. Callaham, is accused in this complaint by John B. Marshall of being guilty of a misdemeanor, committed as follows, to wit:

That the said Arthur B. Callaham, on the 1st day

of March, 1913, was, ever since has been, and now is a male person, residing at Juneau, Alaska, and within said District, over the age of twenty-one years, and under the age of fifty years, and that he is neither a soldier, a sailor in the United States navy or revenue cutter service, a volunteer fireman, pauper, insane person, nor territorial charge.

That complainant is the duly appointed, qualified and acting United States Commissioner in and for the Juneau Precinct of Division No. 1, District of Alaska, and that as such commissioner he duly caused to be published in "The Alaska Daily Empire," a newspaper of general circulation published within said precinct, a notice setting forth that the poll tax provided for by Chapter 54 of the 1913 Laws of Alaska was due and payable on or before the 4th day of August, 1913, and that the payment thereof would become delinquent on the 5th day of August, 1913, and warning all persons to pay the same, and that in case of failure to pay said poll tax such persons would be liable to the penalties prescribed by said act.

That the said Arthur B. Callaham did not pay the said poll tax, and that thereafter, on the 7th day of August, 1913, and between the hours of 11 A. M. and 12 M. of said day, complainant, acting as such commissioner, personally served upon the said Arthur B. Callaham, at Juneau, Alaska, a notice in writing, as follows:

"Mr. A. B. Callaham, [1\*]

I hereby demand of you payment of your poll

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\*Page-number appearing at foot of page of original certified Record.



tax for the year 1913, as provided in Chapter 54 of the Laws of 1913, and I hereby give you notice that you are already delinquent by reason of your non-payment of said poll tax for the year 1913, and that you are now subject to the penalties provided for by said act.

JOHN B. MARSHALL,

U. S. Commissioner and Ex-officio Poll Tax Collector."

That the said Arthur B. Callaham wilfully and feloniously refused to pay said poll tax, and still wilfully and feloniously refuses to pay the same, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

JOHN B. MARSHALL.

District of Alaska,  
Division No. One,—ss.

John B. Marshall, being duly sworn, deposes and says that he has read the foregoing complaint, and that the same is true as he verily believes.

JOHN B. MARSHALL.

Subscribed and sworn to before me this 7th day of August, 1913.

FRED M. BROWN,

District Judge, Acting as a Magistrate.

[Endorsed]: In the District Court for the District of Alaska, Division No. 1. United States of America vs. Arthur B. Callaham. Complaint—Chapter 54, Laws of Alaska, 1913. Filed in the District Court, District of Alaska, First Division. Aug. 7,

1913. E. W. Pettit, Clerk. By H. Malone, Deputy.  
[2]

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*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARTHUR B. CALLAHAM,

Defendant.

**Demurrer.**

Comes now the above-named defendant and demurs to the complaint on file herein, for the reason that it appears upon the face of said complaint that the same does not state facts sufficient to constitute a crime.

SHACKLEFORD & BAYLESS,  
Z. R. CHENEY,

Attorneys for Defendant.

Due service of a copy of the within is admitted this 9th day of August, 1913.

J. W. RUSSELL,  
Attorney for Complainant.

[Endorsed]: Original. No. ——. In the District Court for the District of Alaska, Division No. 1, at Juneau. United States of America, Plaintiff, vs. Arthur B. Callaham, Defendant. Demurrer. Shackleford & Bayless, Attorneys for Defendant. Office, Juneau, Alaska. Filed in the District Court,

District of Alaska, First Division. Aug. 9, 1913. E.  
W. Pettit, Clerk. By —————, Deputy. [3]

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*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

#930—B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARTHUR B. CALLAHAM,

Defendant.

### **Judgment and Sentence.**

Complaint having been filed in the above-entitled court and cause against Arthur B. Callaham, charging said defendant with violation of Chapter 54, Laws of Alaska, 1913; and the said Arthur B. Callaham having filed and submitted his demurrer to the said complaint and to the whole thereof; and the said demurrer having been by this Court in all respects disallowed and overruled; and the said defendant, Arthur B. Callaham, at Juneau, in said Division and District, on Saturday, the 9th day of August, 1913, having duly appeared personally in open court accompanied by his attorneys, Messrs. Shackleford & Bayless, and Z. R. Cheney, and then and there in open court refused to plead to said complaint and having given his notice of election to stand upon said demurrer and not further plead and to take advantage of the provisions of Section 97 of Carter's Alaska Criminal Code of Procedure and to submit to judgment thereunder;

NOW, THEREFORE, it is hereby ordered, adjudged and decreed that the said Arthur B. Callaham is guilty of the offense charged in said complaint herein.

And it is further ordered, adjudged and decreed that you, the said Arthur B. Callaham, defendant in the above-entitled cause, in punishment of the offense aforesaid of which you have been adjudged guilty as charged, [4] be and you are hereby sentenced to pay a fine in the sum of five dollars (\$5.00), together with the costs of this action.

Done in open court at Juneau, Alaska, this 11th day of August, 1913.

FRED M. BROWN,  
Judge of the District Court for the District of  
Alaska, Division No. 1.

To the whole of which judgment and sentence, and each and every part thereof, the defendant excepts and his exceptances are allowed.

FRED M. BROWN,  
Judge.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Aug. 11, 1913. E. W. Pettit, Clerk. By —————, Deputy. [5]

*In the District Court for the District of Alaska,  
Division No. 1, at Juneau.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARTHUR B. CALLAHAM,

Defendant.

**Petition for Writ of Error and Order Allowing Same.**

Comes now Arthur B. Callaham, defendant in the above-entitled cause, and feeling himself aggrieved by the judgment of the Court entered on the 9th day August, 1913, adjudging him guilty of the offense charged in the complaint herein and sentencing him to pay a fine of \$5.00, together with the costs of the action, and petitions the said Court for an order allowing the defendant a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, to review the said judgment and proceeding, and further petitions that the said appeal be heard at the next term of said court at Seattle, State of Washington.

Dated at Juneau, Alaska, August 9, 1913.

SHACKLEFORD & BAYLESS,  
Z. R. CHENEY,

Attorneys for Defendant.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Aug. 11, 1913. E. W. Pettit, Clerk. By ————, Deputy. [6]



**[Order Allowing Writ of Error, etc.]**

Now on this 11th day of August, 1913, it is ordered that the writ of error above prayed for be allowed; and it is further ordered that the said writ of error shall be and operate as a supersedeas and that the execution of judgment herein be suspended forthwith.

FRED M. BROWN,  
Judge of the District Court for the District of  
Alaska, Division No. 1.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Aug. 11, 1913. E. W. Pettit, Clerk. By —————, Deputy. [7]

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

ARTHUR B. CALLAHAM,  
Plaintiff in Error,  
vs.

UNITED STATES OF AMERICA,  
Defendant in Error.

**Writ of Error [Original].**

United States of America,  
District of Alaska,—ss.

The President of the United States to the Honorable, the Judge of the District Court for the District of Alaska, Division No. 1, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment which is in the said

District Court before you, between the United States of America, plaintiff, and Arthur B. Callaham, defendant, a manifest error hath happened to the great damage of the defendant, Arthur B. Callaham, plaintiff in error, as by his complaint appears.

We are willing that error, if any has been, should duly be corrected and full and speedy justice be done to the said party in this behalf, and do command you that then, under your seal, you send the record and proceedings aforesaid and all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, in the city and county of San Francisco, State of California, together with this writ, so as to have the same at said place in said District Court within thirty (30) days from the date of this writ, that the record and proceedings aforesaid being inspected, the Circuit Court of Appeals may cause further to be done therein to correct these errors at the next term of said Court to be held at Seattle, Washington, [8] as according to the right and the laws and customs of the United States of America should be done.

WITNESS, the Honorable EDWIN DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 11th day of August, 1913.

WITNESS the hand and seal of the District Court for the District of Alaska, Division No. 1, at the Clerk's Office at Juneau, Alaska, this 11th day of August, 1913.

[Seal]

E. W. PETTIT,  
Clerk of the District Court for the District of  
Alaska, Division No. 1.

Allowed this 11th day of August, 1913.

FRED M. BROWN,  
Judge of the District Court for the District of  
Alaska, Division No. 1.

Due service of the foregoing writ of error is hereby  
admitted this 11th day of August, 1913.

J. W. RUSSELL,  
Attorney for Defendant in Error. [9]

[Endorsed] Filed in the District Court, District  
of Alaska, First Division. Aug. 11, 1913. E. W.  
Pettit, Clerk. By —————, Deputy, [10—11]

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

ARTHUR B. CALLAHAM,  
Plaintiff in Error,  
vs.

UNITED STATES OF AMERICA,  
Defendant in Error.

**Citation [on Writ of Error (Original)].**

United States of America,  
District of Alaska,—ss.

The President of the United States of America to  
the United States and to J. W. Russell, Attor-  
ney for Defendant in Error:

You are hereby cited and admonished to be and  
appear in the United States Circuit Court of Ap-  
peals for the Ninth Circuit, to be held in the city of  
Seattle, State of Washington, within thirty (30)  
days from the date of this citation, pursuant to a

writ of error filed in the Clerk's Office of the District Court for the District of Alaska, Division No. 1, wherein Arthur B. Callaham is plaintiff in error and the United States of America is defendant in error to show cause, if any there be, why judgment in said writ of error mentioned should not be reversed and speedy justice should not be done to the said Arthur B. Callaham in that behalf.

Witness, the Honorable EDWIN DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 11th day of August, 1913.

FRED M. BROWN,

Judge of the District Court for the District of Alaska, Division No. 1.

[Seal]

Attest: E. W. PETTIT,

Clerk of the District Court for the District of Alaska, Division No. 1. [12]

Due service of the foregoing citation is hereby admitted this 11th day of August, 1913.

J. W. RUSSELL,

Attorney for Defendant in Error. [13]

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Aug. 11, 1913. E. W. Pettit, Clerk. By ———, Deputy. [14—15]

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

ARTHUR B. CALLAHAM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**Assignment of Errors.**

Comes now the petitioner, Arthur B. Callaham, in the above-entitled action, and assigns the following errors as having been committed by the Trial Court in the proceedings in the above-entitled action upon which the petitioner intends to and does rely in prosecuting his writ of error herein:

1. The Court erred in overruling the demurrer of said petitioner to the complaint as a whole;

2. The Court erred in entering judgment against the petitioner herein;

3. The Court erred in sentencing the petitioner herein under said judgment.

SHACKLEFORD & BAYLESS,  
Z. R. CHENEY,

Attorneys for Petitioner.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Aug. 11, 1913. E. W. Pettit, Clerk. By ———, Deputy. [16]



*In the District Court for the District of Alaska, Division No. 1, at Juneau.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARTHUR B. CALLAHAM,

Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, that a judgment having been rendered on the 9th day of August, 1913, whereby Arthur B. Callaham, the above-named defendant, was adjudged guilty of the offense charged in the complaint on file herein and sentenced to pay a fine of the sum of five dollars (\$5.00), together with the costs of this action, and the said defendant having sued out a writ of error and appealed from said judgment and having been duly admitted to bail in the sum of \$250.00.

I, Henry Shattuck, residing at Juneau, Alaska, merchant and manufacturer by occupation, hereby undertake that the above-named Arthur B. Callaham shall in all respects abide and perform the orders and judgments of the Appellate Court upon appeal, or if he fail to do so in any particular, that I will pay the United States the sum of \$250.00.

Dated at Juneau, Alaska, August 11, 1913.

HENRY SHATTUCK.

Taken and acknowledged before me the day and year above written.

FRED M. BROWN,  
Judge of the District Court for the District of  
Alaska, Division No. 1. [17]  
United States of America,  
District of Alaska,—ss.

Henry Shattuck, being first duly sworn, on oath deposes and says: I am a resident of the town of Juneau, District of Alaska, and am not a counsellor or attorney at law, marshal, clerk of any court, or other officer of any court; that I am worth the sum of \$250.00, exclusive of property exempt from execution and over and above all just debts and liabilities.

HENRY SHATTUCK.

Subscribed and sworn to before me this 11th day of August, 1913.

FRED M. BROWN,  
Judge of the District Court for the District of  
Alaska, Division No. 1.

Approved:

FRED M. BROWN,  
District Judge.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Aug. 11, 1913. E. W. Pettit, Clerk. By H. Malone, Deputy. [18]

**[Praeceptum for Transcript of Record.]**

SHACKLEFORD & BAYLESS,  
Attorneys and Counsellors at Law,  
Juneau, Alaska.

August 9, 1913.

Mr. E. W. Pettit,  
Clerk of the District Court,  
Division No. 1,  
Juneau, Alaska.

Dear Sir:—

Please prepare the record for appeal in the case of the United States vs. Arthur B. Callaham, in the District Court, and certify the following papers, to wit:

1. Copy of Complaint.
2. Copy of Demurrer.
3. Judgment on Demurrer and Sentence.
4. Appeal papers.
  - a. Petition for Appeal.
  - b. Order Allowing Appeal.
  - c. Writ of Error.
  - d. Citation.
  - e. Assignment of Errors.
  - f. Appeal Bond.

When so prepared you will kindly transmit this record to the United States Circuit Court of Appeals at San Francisco.

Very truly yours,  
SHACKLEFORD & BAYLESS,  
Z. R. CHENEY,  
Attorneys for Defendant.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Aug. 11, 1913. E. W. Pettit, Clerk. [19]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record, etc.]**

*In the District Court for the District of Alaska,  
Division Number One at Juneau.*

No. 930-B.

UNITED STATES OF AMERICA,

Plaintiff and Defendant in Error,

vs.

ARTHUR B. CALLAHAM,

Defendant and Plaintiff in Error.

I, E. W. Pettit, Clerk of the District Court for the District of Alaska, Division Number One, do hereby certify that the above and foregoing and hereto attached nineteen pages of typewritten and written matter, numbered from one to nineteen, both inclusive, constitutes a full, true and correct copy of the record, and the whole thereof, prepared in accordance with the praecipe of the defendant and plaintiff in error, on file in my office, and made a part hereof, in Cause No. 930-B, of the above-entitled court, wherein the United States of America is plaintiff and defendant in error, and Arthur B. Callaham is defendant and plaintiff in error.

I do further certify that the said record is by virtue of the Writ of Error and Citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to Six and 95/100 Dollars (\$6.95), has been paid to me by plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the above-entitled court this 11th day of August, 1913.

[Seal] E. W. PETTIT,  
Clerk of District Court, Dist. of Alaska, Division  
No. 1.

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[Endorsed]: No. 2308. United States Circuit Court of Appeals for the Ninth Circuit. Arthur B. Callaham, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Received and filed August 20, 1913.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.





IN THE  
**UNITED STATES CIRCUIT COURT  
OF APPEALS**

FOR THE NINTH CIRCUIT

ARTHUR B. CALLAHAM,  
Plaintiff in Error,  
vs.

UNITED STATES OF AMERICA,  
Defendant in Error.

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ARTHUR B. CALLAHAM for him-  
self and all Male Residents of Ju-  
neau Precinct,  
Appellant,  
vs.

JOHN B. MARSHALL, as United  
States Commissioner for the Ju-  
neau Precinct and Ex-officio Col-  
lector of Poll Tax,  
Apellee.

**BRIEF OF APPELLANT AND PLAINTIFF IN ERROR**

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STATEMENT OF CASE

The two causes above entitled involve the same questions with reference to the validity of the attempted collection of poll tax in the Territory of Alaska for the year 1913, and for this reason the

brief herein has been entitled in both cases and the same brief filed in both of the causes above entitled. The case of Callaham against Marshall arose through injunction proceedings, seeking to enjoin the collection of the poll tax. The complaint in the case was demurred to by the defendant and the demurrer sustained, and judgment entered against the plaintiff, Callaham, and an appeal taken to this Court. The case of Callaham, Plaintiff in Error, vs. United States of America, Defendant in Error, arose from a criminal information filed in the District Court for the District of Alaska, charging Callaham with the crime of wilfully and feloniously failing to pay his poll tax; to this information or complaint the defendant Callaham demurred and the demurrer was overruled and a judgment entered against Callaham. Pursuant to Section 97 of the Code of Criminal Procedure for the District of Alaska, Callaham sued out his writ of error.

The necessity of contesting the poll tax law within a short time gave rise to an order from the District Court setting the cases for disposition by the Circuit Court of Appeals at its next Seattle session. The short time allowed in which to bring this matter to issue at the Seattle session has compelled the plaintiff in error and appellant to write his brief before the printed record has reached him, but the record is so short that references to the pages of the record have been omitted; in each case the original pleadings, demurrer and judgment being the only matters of record before the lower court.

## SPECIFICATION OF ERRORS

First: The lower court erred in overruling the demurrer of the defendant (a) to the complaint in the injunction case; (b), to the complaint or criminal information in the criminal case.

Second: The court erred in giving and entering judgment against the defendant upon the record herein (a) in the injunction case; (b), in the criminal case.

## BRIEF AND ARGUMENT

The specification of errors above set forth raises two questions: first, that the poll tax law passed by the first legislature for the Territory of Alaska, approved May 1, 1913, violates the organic act providing for a legislature for the Territory of Alaska in that it provides for the levy and collection of the tax by the United States Commissioner, who is "a person who is holding a commission or appointment under the United States" and who, by the provisions of the poll tax act, holds an "office under the government of the Territory" of Alaska. The second proposition involved in these two cases is that the poll tax act, approved May 1, 1913, passed by the territorial legislature, provides for an annual tax which should be levied upon the first of March of each year in accordance with the provisions set forth in the said poll tax act, and that, therefore, the act did not contemplate the collection of said tax until after the first of March, 1914.

THE DESIGNATION OF UNITED STATES COMMISSIONERS AS POLL TAX COLLECTORS IS IN VIOLATION OF THE ORGANIC ACT PROVIDING FOR A LEGISLATURE FOR THE DISTRICT OF ALASKA.

When Congress provided for a legislative assembly for the District of Alaska, it placed certain limitations upon the power of that assembly, and, anticipating a probable tendency on the part of the legisla-



ture to impose additional duties upon the officers who had held their offices by virtue of congressional acts and anticipating the probable incompatibility of such duties, Congress provided by Section 11 of the organic act (37 Statutes at Large, page 512) that:

“No person holding a commission or appointment under the United States \* \* \* \* \* shall hold any office under the government of said Territory.”

Among the various definitions of “office” which have been given by the authorities and which are collected in 29 Cyc. 1361-1364, are the following:

“A duty, charge or trust; a place of trust; a position to which certain duties are attached; a right and correspondent duty to execute a public or private trust and to take the emoluments belonging to it; a right to exercise a public or private employment and to take the fees and emoluments thereunto belonging, whether public, as those of magistrates, or private, as those of bailiffs, receiver, and the like; \* \* \* a position or appointment entailing certain rights and duties; \* \* \* a post, the possession of which imposes certain duties on the possessor, and confers authority for their performance; a position or station in which a person is employed to perform certain duties, or by virtue of which he becomes charged with the performance of certain duties, public or private; a right to exercise a public function or employment, and to take the fees and emoluments belonging to it; \* \* \* a particular duty, charge or trust, conferred by public authority and for public purpose. In a stricter legal sense an employment on behalf of the government in any station or public trust, not merely transient, occasional, or incidental; a public station or employment conferred by the appointment of government; a right and duty confer-

red on an individual to perform any part of the function of government, and receive such compensation, if any, as the law has fixed to the service; a public position, to which a portion of the sovereignty of a country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public; an appointment or authority on behalf of the government to perform certain duties; \* \* a special duty, trust, or charge, conferred by authority, and for a public purpose.”

From the foregoing definitions it is apparent that the Legislature has conferred upon the commissioners “a special duty, trust or charge” in prescribing that they shall collect poll taxes. Therefore, they have conferred upon the commissioners public offices. The fact that no particular name has been applied by the legislature to the persons designated to collect poll taxes is immaterial. The commissioners have been made collectors of poll taxes just as fully and truly as if the persons chosen to perform that duty were by the act specifically designated “collectors of poll taxes.” The office, namely, “the special duty, trust or charge”, has been created, and the commissioners have been chosen to perform the same; indeed, section 9 of the act explicitly recognizes the duty or charge laid by this act upon the commissioner as an office, for it provides that the commissioner before entering upon his duties shall give a bond “conditioned for the faithful discharge of the duties of his office”.

In *Shelby v. Aleorn*, 36 Miss. 273, the question arose whether under a statute similar to Section 11

of our organic act a person who held the office of senator in that state was eligible to the office of levee commissioner of a county in the state; and among other things the Court said:

“The law itself provides that the levee commissioner shall hold his office for the term of two years, under such restrictions as are herein prescribed. He is required to give bonds, and to discharge the duties of treasurer, in which position he is entitled to receive large sums of public money. The board of police, under the report of the levee commissioner as to the cost of the work to be done, is required to levy a sufficient tax to meet it; and he is required to take an oath ‘that he will in all things touching his office, seek to promote the best interests of his county and the State of Mississippi.’ These directions, of themselves, without doubt, define the character of the place of levee commissioner, and determine it to be an office.”

And this case is quoted with approval in *Attorney General v. Common Council* (Mich.) 70 N. W. 450, 452. And in 29 Cyc. 1386, it is said:

“One of the usual necessary formalities for the qualification of an officer is the taking of the official oath. One who is appointed or elected to office and does not take the required official oath does not possess the legal title to the office.”

And again it is said:

“An official bond is an obligation with sureties given by a public officer as security for the faithful discharge of the duties of his office, or, as the term is used in statutes, the bond of a public officer. Generally the filing of the official bond is like the taking of the official oath regarded as a necessary prerequi-

site to the full legal title to the office. In the absence of a contrary statutory provision a person holding two separate offices must give two separate official bonds."

And in the same place it is said:

"The fact that the legislature imposes new duties upon an officer will not require him to take a new oath of office."

Therefore, it is manifest that the legislature itself considered the position of collector of poll taxes as an office, for it exacted a bond from the commissioner for the faithful performance of the duties of poll tax collector and clearly, under the authorities, the legislature correctly deemed the position an office—a new office; for if it had considered that the statute merely imposed new duties on the commissioner the legislature would not have exacted a new and separate bond.

The poll tax act is copied in full in the complaint in the injunction case and reference is made to the same for the purpose of ascertaining the provisions of the act. Section 9 of the act provides that the commissioner shall give a bond to the Territory of Alaska "for the faithful discharge of the duties of his office"; Section 10 provides that the commissioner shall keep an accurate account of all moneys received by him under the provisions of the poll tax act and receive as full compensation 15 per centum of all taxes collected.

It is plain to be seen that the provisions of this

act imposed upon the commissioner new duties not contemplated by the acts of Congress which had created the office of United States Commissioner many years before; that he was accountable not to the United States for the performance of these duties, but to the Territory and its officers alone.

The act of May 17, 1884, (23 Stat. L. p. 24), providing for civil government in the District of Alaska, Sec. 5, provided:

“There shall be appointed by the President four commissioners in and for said District, who shall have the jurisdiction and powers of commissioners of the United circuit courts in any part of said District.”

The act of Congress of June 6, 1900, making further provisions for civil government in Alaska, Sec. 6, provided:

“The respective judges of the court shall appoint and at their pleasure remove clerks, and commissioners in and for the District \* \* \* \* \* The commissioners shall be ex-officio, justices of the peace, recorders, and probate judges.”

At the time of the passage of the act providing for the organization of the first territorial legislature it is self evident that any commissioner in the District of Alaska was a “person holding a commission or appointment under the United States.” The commissioners were the creations of the acts of Congress relating to Alaska, and were appointed by the United States judges, who were also creations of the



acts of Congress relating to Alaska and represented the United States in the Territory of Alaska and were accountable only to the United States. If the persons who held office under these organic acts were not persons "holding a commission or appointment under the United States", then there were no persons in the District holding commissions or appointments under the United States. All of the active duties connected with the levy and collection of this tax under the poll tax act were imposed upon the United States commissioners, and the result is that we have an act of the territorial legislature which, first, compensates the commissioners with fifteen per centum of all taxes collected and gives them a personal interest in the collection of all the taxes, which provides that they shall give such notices and take such action toward the distraint of property as shall end in the collection of the tax; and which makes it a crime to violate the provisions of the act levying the tax. The result, therefore, is that the United States commissioner occupies the position of tax collector for the Territory, is called upon to exercise the duties of a constable or marshal in seeing that the tax is collected, and finally, by reason of the criminal jurisdiction of the United States commissioner, he is made a judge of the guilt or innocence of any person who is charged with failing to pay his poll tax when at the same time he has a pecuniary interest in the collection of the tax. In addition to the duplicity of offices prohibited by Sec. 11 of the organic act providing for a territorial legislature, we

have also an incompatibility of offices which is in violation of the common law. By the act of Congress of June 6, 1900, 31 Stat. L. 321, 552, carried into Carter's Code, Part V., Sec. 567, and Compiled Laws of Alaska, Sec. 796, it is provided:

“So much of the common law as is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be passed by the Congress is adopted and declared to be law within the District of Alaska.”

And at the common law two incompatible offices could not be held by the same person. The assumption of the second constituted and was *ipso facto* a vacation of the first office. The office of commissioner is incompatible with that of poll tax collector. For the commissionership is a judicial office and the poll tax collectorship is an executive office. If a person fails to pay his poll tax, the collector “must collect by seizure and sale of any personal property owned by such person, and any personal property thus seized shall be sold as provided by law for the sale of personal property in execution, except that three days’ notice of the time and place of sale shall be sufficient.” (Sec. 6.) Thus the collector is given the duties of a marshal—executive duties—to perform. And Section 12 makes any violation of the provisions of the act a misdemeanor. Therefore a failure to pay the tax would be a crime punishable in the court of the commissioner as *ex-officio* justice of the peace, i. e. the commissioner would be both the private prosecutor and the judge, for he would

naturally be the person who must swear to the complaint charging failure to pay the tax. Therefore we have this predicament: The commissioiner as executive officer demands the tax; payment is refused; as executive officer he makes and swears to a complaint before himself as a judicial officer and, conversely, as judicial officer he listens to himself as private prosecutor; and as judicial officer he tries the accused. He is at one and the same time and in the same proceeding private prosecutor, witness and judge. In effect he is a party in the case and the judge of his own case. Could two offices be more violently antagonistic and incompatible?

In *State v. Goff* (R. I.) 9 Atl. 226, 227, it is said:

"The test of incompatibility is the character and relation of the offices, as where one is subordinate to the other, and subject, in some degree to its revisory power; or where the functions of the two offices are inherently inconsistent and repugnant. In such cases it has uniformly been held that the same person cannot hold both offices. In *Rex v. Pateman*, 2 Term R. 777, it was declared that, where a town clerk acts ministerially under the aldermen, who are judicial officers, one cannot hold both offices. Much stress is laid upon the fact that the accounts of the clerk were subject to the revision and control of the aldermen. *Rex v. Tizzard*, 9 Barn. & C. 418, is to the same effect. In *Cotton v. Phillips*, 56 N. H. 220, where one was chosen a member of the prudential committee and also an auditor in a school district, it was held he could not hold both offices. The court says: 'If the same person could hold both offices, he would in fact sit in judgment on his own acts.' In England a sheriff's duties are ministerial, and, to a limited extent, also judicial. While these

peculiar functions are recognized, in some cases, as being necessarily imposed upon the office by legislation and custom, no case upholds the propriety of exercising both the ministerial and judicial functions at the same time and in the same case. *Widow v. Clerks*, 1 Cro. Eliz. 76, case 38. \* \* \*

“Under our law there is no such confusion of duties. In this state, and doubtless in this country generally, a sheriff is simply a ministerial officer. If he performs judicial duties, it is by virtue of another office voluntarily assumed. But the incongruity of such offices in one person is manifest. To say nothing of the breach of dignity and propriety which would result from an attempt to perform the duties of judge and officer together, the power of a judge to pass upon the sufficiency of an officer’s return, and to allow or disallow his fees, are quite sufficient to bring these offices within the recognized rule of incompatibility, by reason of the judicial supervision of one office and the accountability of the other. Moreover, in this state, an officer is required to serve any process duly tendered to him, and thus a judge of a district court might have the process of his own court tendered to him to be served, and become liable to a penalty if he did not do it. In many cases he is the complaining officer, whose complaint could only be made by himself, if he were also judge, unless aided by special legislation.

\* \* \* “We think the offices of justice of a district court and deputy sheriff are incompatible, and that, by accepting the latter, the respondent vacated the former.”

The same view was held in the case of *Stubbs v. Lee*, (Me.) 18 Am. Rep. 251, where the court said:

“The defendant having been appointed and sworn as a deputy-sheriff must be regarded as having accepted that office. By that acceptance he sur-



rendered the office of trial justice, a judicial office incompatible with that of a deputy-sheriff. His judicial authority, therefore, as a trial justice was at an end."

In his work on Public Officers, Mr. Mechem says, Sec. 422:

"Incompatibility which shall operate to vacate the first office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both."

And among the offices which he says the authorities have held to be incompatible, so that an acceptance of the second vacates the first, are the following: town clerk and alderman; trial justice and deputy-sheriff; justice of the peace and constable; justice of the peace and sheriff or deputy-sheriff; member of a prudential committee and auditor of a school district; state solicitor and member of congress, city alderman and city marshal; postmaster and judge of the county court.

We submit, therefore, that the poll tax act, which imposes all of the active and important duties of the collection of poll tax upon the United States commissioner, is void for the reason that it overrides the restrictions placed by Congress upon the territorial legislature and violates the principles of the common law.

SECOND: THE ACT OF THE ALASKA LEGISLATURE, PROVIDING FOR THE COLLECTION OF A POLL TAX IN THE TERRITORY, APPROVED MAY 1, 1913, DID NOT CON-



TEMPLATE THE COLLECTION OF A POLL  
TAX PRIOR TO THE YEAR COMMENCING  
MARCH 1, 1914.

The record in this case has been made up pro forma for the purpose of testing this law before the Circuit of Appeals we assume upon the theory that it was the duty of the District Court for the District of Alaska to sustain the law in favor of the contention of the tax collector and force the burden of the appeal upon the person protesting against the tax. There is nothing in the record to enlighten this Court or counsel for the plaintiff in error and appellant upon what ground the lower court proceeded in holding that it was a crime to refuse to pay a poll tax before March 1, 1914, and in holding that the tax was collectible prior to that date; and we are at a loss, therefore, to present any authorities except references to the provisions of the act itself, and we are unable to reach any other conclusion than that the legislature had no intention whatever of collecting the tax until the fiscal year provided in the act, commencing March 1st, 1914. In the first place, the act of Congress approved August 24, 1912, creating a legislative assembly in the Territory of Alaska (37 Stat. L. p. 512) provided that the first meeting of the legislative assembly should convene at the City of Juneau on the first Monday in March, 1913. Any act, therefore, which provided for the performance of certain essential duties prior to the first day of any month of March could not have been introduced

except with the intent that these duties could not be performed until the first day of March, 1914, for the reason that the first Monday in March, 1913, was the third day of March, 1913, and no member of the territorial legislature could have introduced an act (where the same contemplated the doing of certain things prior to any month of March) with the intention of the same having effect prior to the first day of March, 1914, for the reason that the legislature could not have been called to order until the third day of March, 1913. In view of this condition of affairs let us examine the poll tax act. Sec. 1 of the act provides:

“Section 1. That there is hereby made, imposed and levied upon each male person, except soldiers, sailors in the United States navy or revenue cutter service, volunteer firemen, paupers, insane persons, or territorial charges, within the Territory of Alaska or the waters thereof, over the age of twenty-one years, and under the age of fifty years, an annual tax in the sum of four dollars to be paid and collected in the manner provided in the following sections of this act.”

Section 2 then proceeds to provide the method of collecting the tax and is to be construed in the light of the well known rule of constitutional law that “due process requires that the person assessed have notice or an opportunity to be heard at some time before the charge becomes fixed and absolute against him”. 8 Cyc, page 1134. Let us see then what the following section provides:

“Sec. 2. That the commissioner of each precinct

in the Territory of Alaska, shall, on or before the first day of March in each year, set down upon such blanks as the Treasurer of the Territory of Alaska may prescribe, the names of all persons residing within his precinct subject to the tax herein provided for; one of such blanks shall be transmitted by the commissioner to the Treasurer of the Territory and the other shall be retained by him. At the time of transmitting one copy of said duplicate list of names of the persons subject to the tax herein provided for within his precinct, the commissioner shall cause to be published in at least one newspaper of general circulation published within his precinct or if there be no newspaper then by posting in five public places within his precinct a notice setting forth that the poll tax provided for in this act is due and payable between certain dates and that the payment thereof will become delinquent as provided in this act, and warning all persons to pay the same, and that in case of failure to pay the same, penalties, as herein provided for, will be imposed and it shall be the duty of every person liable to pay such tax, to pay the same to the commissioner within the time in which such notice specifies."

It is the evident intention from the section above quoted that the legislature contemplated that a roll of the persons subject to the poll tax should be made up before the first of March of each year, in duplicate, one to remain in the possession of the tax collector, and one to be transmitted to the Treasurer of the Territory; that this roll with reference to this particular tax was intended to take the place of and to be similar to the ordinary assessment rolls and made up so as to give due notice to any person inquiring as to whether he had been included in the assessment of the poll tax. It provided two offices in

which the persons levied upon would find their names and provided for a published notice which would put all persons upon inquiry as to whether they were included in the levy. It contemplated that the levy should apply only to persons residing in the District. Section 3 of the act provided:

“Sec. 3. The tax herein provided for shall be paid between the first Monday in April and the first Monday in the month of August in each year.”

It is to be remembered that the act became a law on the first day of May, 1913, and that the legislature could not have contemplated the payment of the tax during the month of April, 1913. Section 8 of the act provides as follows:

“The Territorial Treasurer must, before the first Monday in March of each year, deliver to each commissioner in the Territory of Alaska blank poll tax receipts.”

For the purposes of this record we assume that it is admitted that there was no Territorial Treasurer in the Territory of Alaska until the third day of July, 1913, as the allegations in the injunction case are undenied. Furthermore it may be deduced from the statutes of the United States referring to the District of Alaska that no Territorial Treasurer could exist prior to the third day of March, 1913; so that one of the prerequisites to the collection of this tax being the making up of a roll in each of the precincts before the first of March of each year, could not have been complied with and THE ATTEMPT

## TO COLLECT THE TAX FOR THE YEAR 1913 COULD NOT POSSIBLY BE VALID.

“A levy cannot be based upon a list or roll not made until after the levy, although in the same year.” 37 Cyc., page 974.

“A statutory provision that the tax levy shall be made at a certain time of the year, or between certain dates, is generally held to be mandatory, so that a levy made at any other time is invalid.” 37 Cyc., page 975.

In view of these well known principles and in view of the evident intention of the territorial legislature to provide a systematic and formal way of collecting the tax by the performance of certain acts which could not occur until shortly prior to the first day of March, 1914, we submit that there is no ground whatever upon which to base the attempted collection of the tax or criminal prosecution of the plaintiff in error during the year 1913.

The only argument that has been advanced so far to sustain the validity of the attempted collection of the tax for the year 1913 is that of public necessity. The provisions of the act are so plain themselves that it would be nothing more or less than judicial legislation to hold that a poll tax could be collected before the first of March 1914. To say that on or about the first of May, 1913, the Alaska legislature intended to levy a tax for 1913 by the provisions of this act would be charging a body of intelligent men with giving no expression, indeed, to their intention.

It was within the power of the legislature to



have changed the date for the making up of the rolls to the first of July, 1913, or to any other date subsequent to the passage of the act, which would have made such intention clear and unequivocal. To ask that the courts hold that such intention is clear, namely, to levy a tax for the year 1913, is, we respectfully submit, an unwarranted request or tax upon the imagination of the courts.

Respectfully submitted,

ARTHUR B. CALLAHAM,

*In propria personam.*

LEWIS P. SHACKLEFORD,

Z. R. CHENEY,

W. S. BAYLESS,

Attorneys for Plaintiff in Error  
and Appellant.

IN THE UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NO. 2308 { ARTHUR B. CALLAHAM,  
Plaintiff in Error,  
vs.  
UNITED STATES OF AMERICA,  
Defendants in Error.

NO. 2305 { ARTHUR B. CALLAHAM,  
Appellant,  
vs.  
JOHN B. MARSHALL, as  
United States Commissioner, etc.,  
Appellee.

BRIEF FOR THE TERRITORY OF ALASKA

J. H. COBB,  
Counsel for the Territory.



## STATEMENT.

The first Legislature of the Territory of Alaska passed the following poll tax law:

### CHAPTER 54.

(H. B. No. 98.)

AN ACT to impose a poll tax upon male persons in the Territory of Alaska and providing means for its collection.

*Be it enacted by the Legislature of the Territory of Alaska:*

Section 1. That there is hereby made, imposed and levied upon each male person, except soldiers, sailors in the United States Navy or Revenue Cutter service, volunteer firemen, paupers, insane persons, or Territorial charges, within the Territory of Alaska or the waters thereof, over the age of twenty-one years, and under the age of fifty years, an annual tax in the sum of four dollars to be paid and collected in the manner provided in the following sections of this act.

Sec. 2. That the commissioner of each precinct in the Territory of Alaska, shall, on or before the first day of March in each year, set down upon such blanks as the Treasurer of the Territory of Alaska may prescribe, the names of all persons residing within his precinct subject to the tax herein provided for; one of such blanks shall be transmitted by the commissioner to the Treasurer of the Territory and the other shall be retained by him. At the time of transmitting one copy of said duplicate list of names of the persons subject to the tax herein provided for within his precinct, the commissioner shall cause to be published in at least one newspaper of general circulation published

within his precinct or if there be no newspaper then by posting in five public places within his precinct a notice setting forth that the poll tax provided for in this act is due and payable between certain dates and that the payment thereof will become delinquent as provided in this act, and warning all persons to pay the same, and that in case of failure to pay the same, penalties, as herein provided for, will be imposed and it shall be the duty of every person liable to pay such tax, to pay the same to the commissioner within the time in which such notice specifies.

Sec. 3. The tax herein provided for shall be paid between the first Monday in the month of April and the first Monday in the month of August in each year.

Sec. 4. It shall be the duty of the commissioner to receipt to each person upon payment of the poll tax herein provided for and the receipt so delivered shall be the only evidence of payment.

Sec. 5. Every person indebted to one who neglects or refuses, after demand, to pay a poll tax becomes liable therefor and must pay the same for such other person after service upon him by the Commissioner of a notice in writing stating the name of such person.

Sec. 6. Every person paying the poll tax of another may deduct the same from any indebtedness to such other person. The commissioner must demand payment of poll tax from every person liable therefor and on the neglect or refusal of such person to pay the same, he must collect by seizure and sale of any personal property owned by such person, and any property thus seized shall be sold as provided by law for the sale of personal property on execution except that three days' notice of the time and place of the sale shall be sufficient.

Sec. 7. It shall be the duty of the commissioner to collect and enforce the collection of all unpaid taxes by giving notice in writing to such delinquent, personally or by mail, and such delinquent shall pay a penalty of one dollar in addition to such tax.

Sec. 8. The Territorial Treasurer must, before the first Monday in March in each year, deliver to each com-



missioner in the Territory of Alaska blank poll tax receipts, in book form with stubs numbered the same as the receipts, of one hundred in each book a sufficient number for each commissioner. The form of such receipts and stubs shall be prescribed by the Territorial Treasurer and shall be approved by the Governor of the Territory.

Sec. 9. The commissioner shall, before entering upon the performance of his duties as herein prescribed, execute a bond to the Territory of Alaska in the sum to be fixed by the Territorial Treasurer which shall not be less than double the amount of money which will probably come into his hands under this act during any one year. Said bond shall be executed with two or more sureties and the same shall be approved by the Territorial Treasurer; said bond shall be conditioned for the faithful discharge of the duties of his office and the said bond shall be filed in the office of the Territorial Treasurer.

Sec. 10. The commissioner shall keep an accurate account of all moneys received by him under the provisions of this act, and he shall, not later than the first day in September in each year, transmit the same to the Territorial Treasurer. Such statement shall be verified by the affidavit of the commissioner to the effect that the same is in all respects a full and true statement of all moneys received by him under the provisions of this act; and after the first day of September in each year, the commissioner shall, at least once in three months, file an additional statement setting forth any taxes and penalties collected by him under the provisions of this act during such period of three months, and shall transmit such moneys to the Territorial Treasurer; such supplemental statement shall be made and verified, as herein provided for the first statement.

The commissioner, for services rendered under the provisions of this act, shall receive as full compensation fifteen per centum of all taxes collected, except those collected by action, civil or criminal, and twenty per centum of all delinquent taxes and penalties.

Sec. 11. The Territorial Treasurer shall make and pre-

scribe all rules and regulations to carry into effect the provisions of this act.

Sec. 12. Any person who shall violate any of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be fined in a sum of not more than one hundred dollars nor less than five dollars, or imprisoned in the federal jail for not more than thirty days nor less than one day.

Sec. 13. This bill shall take effect from and after its passage.

Approved, May 1, 1913.

The Act, by its terms, went into effect May 1st, 1913.

The Commissioner for the Juneau precinct, having taken the prescribed steps for collecting the tax, A. B. Callaham instituted one of these proceedings to enjoin its collection. The Court below sustained a general demurrer to the complaint, and dismissed the suit, and Callaham appealed.

A criminal complaint, under the Act, was filed against Callaham for refusing to pay the tax, and he was convicted, and brings error. The appellant and plaintiff in error has filed the same brief in each one of these cases, and we shall follow the example set.

#### FIRST—THE INJUNCTION SUIT.

The Court below based its ruling in sustaining the demurrer, upon the ground that plaintiff (appellant) had a plain, speedy and adequate remedy at law, and the bill presented nothing invoking the interposition of the equity powers of the Court. This

phase of the case is not touched upon in the brief of the appellant; and yet we think it conclusive of the appeal.

Ist, High in Injunctions, 2nd, Ed. sec 485, and authorities cited.

## SECOND—THE CRIMINAL ACTION.

It is not contended by the plaintiff in error, that the Legislature did not have the power under the organic act, to levy a poll tax; nor to make it a misdemeanor to fail to pay it. His contention, as we understand it, is: 1st, That the Legislature did not intend that the tax should be paid for the year 1913; and 2nd, That the entire act is void because it imposes upon the Commissioners, the duty of collecting the tax. We will deal with these contentions in the order stated.

FIRST:—Was the tax laid for the year 1913? The first section provides: "That there is hereby made, imposed, and levied upon each male person \* \* \* an annual tax of four dollars, to be paid and collected in the manner provided in the following sections of this Act."

Section 3 makes the tax payable between the first Monday in April and the first Monday in August of each year; while section 2 prescribes certain lists of persons liable to the tax to be made up by the commissioners and transmitted to the treasurer and notice to be published on or before the first day of March of each year. Section 6 makes it the duty of

the Commissioner to demand and collect the tax from each person liable therefor.

The Act passed with the emergency clause and went into effect May 1st, 1913.

Plaintiff in error claims, that because the time had passed in the year 1913, when the Commissioners were to make up and transmit to the Treasurer the lists of names, no tax could be collected for the year 1913, or that the Legislature did not intend it to be collected for the current year. But the liability for the tax is not dependent upon whether the lists are made up and transmitted to the Treasurer. The law itself makes, imposes, and levies the tax. The provisions regarding the transmitting of the lists of names, etc., are merely directory and prescribe a convenient method of procedure. To hold otherwise, it would follow, that if for the year 1914, say, Mr. Callaham's name should be omitted from the lists, or the lists for a certain precinct should not be made up within the time prescribed, Mr. Callaham would be released from the tax for that year, and so would all persons in the particular precinct, while others would be liable. A construction leading to such results will not be adopted by this court, unless unavoidably compelled by the language of the Act.

"When the law becomes operative as an entirety on the date prescribed by the Legislature, the fact that as to some persons and matters affected by it, the law is of full operation immediately upon the passing into effect and as to others its operation is



not so full and complete until a future day or event stated, is immaterial."

*Hopkins v. Scott*, 38 Neb. 661, 57, N. W. Rep. 391.

*State v. Stuht*, 52 Neb. 209, 71 N. W. Rep. 941.

The fact that that portion of the law providing for the return of lists of names to the Treasurer on or before March 1st, could not become operative until 1914, would not in itself prevent the rest of the act from becoming operative on May 1st, 1913, in accordance with the expressed will of the Legislature. The Legislature could have, in express terms, dispensed with the return of the lists for 1913 on or before March 1st. But why dispense with something that time itself had already dispensed with? The fact remains that the Legislature did make and levy an annual poll tax on May 1st, 1913, payable on or before the first Monday in August.

Besides the Treasurer is given power by section 11, to "make and prescribe all rules and regulations to carry into effect the provisions of this act."

The record is silent as to whether such rules were prescribed, and in that case the Court will presume that they were. Again in section 10, provision is made for collections of such taxes, as have not been paid on the first Monday in August, and report and return thereof.

The Court will take judicial notice of the fact



that this was the first Legislature for Alaska; that the Territory had, when the Legislature met, no revenue laws whatever, and that some revenue for the current year was indispensable if the current expenses of the Territorial Government were to be paid. The Legislature passed three revenue bills.

1st: A license law, and filing fee upon corporations. Session Laws, chap. 11. This act was passed April 21st, and went into effect in ninety days.

2nd: A license tax in business. Cap. 52. This act was passed May 1st, and went into effect in ninety days.

3rd: A poll tax, the act under discussion, which was passed May 1st, with the emergency clause, and went into immediate effect.

Yet the court is asked to hold, that while the Legislature did not intend the law to be effective until March 1st, 1914, it stultified itself by passing it with the emergency clause, putting it into effect May 1st, 1913.

This brings us to the third and last point of the defendant in error; viz:

### IS THE POLL TAX INVALID BECAUSE COMMISSIONERS ARE CHARGED WITH THE DUTY OF ITS COLLECTIONS?

Defendant in error contends, that because the Act of Congress, creating the Legislature provides that no person, "holding a commission or appointment under the United States, shall hold any office

under the government of said Territory," the Legislature was deprived of the power to impose new duties upon the Territorial officers already in existence—that any law imposing such duties is *ultra vires* and void.

The contention is of far-reaching importance, and pushed to its legitimate conclusion, either emasculates the Alaska Legislature of practically all powers, or compels it to create an entirely new set of offices, in addition to those Territorial offices already provided by the Act of Congress. Laws passed by the law-making department are but vain and empty fulminations, until interpreted and applied by the judicial, and enforced by the executive departments. If the contention of plaintiff in error is correct, then the Alaska Legislature can pass no law, which, for its enforcement, imposes a new duty on the Governor, the marshal, the secretary of the District, or the clerks of the Courts.

The words quoted, and upon which the plaintiff in error relies, are not, we think, to receive so narrow a construction. There exists in a territory, as in a state, through the line of separation may not be so marked in the former as in the latter, that dual system of government peculiar to the United States. There is the National Government with officers for the administration of the national laws, of which postmasters, and officers of the customs and of the army and navy are examples readily suggesting themselves; and there are the territorial officers to

The act in question may be subject to criticism. But we think it clear that the Alaska Legislature had the power to lay a poll tax, and provide for its collection through the existing local officials, and this it did.

We ask that the judgment below be affirmed.

Respectfully submitted,

J. H. COBB,

Counsel for the Territory  
Alaska.

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. 2308.

ARTHUR B. CALLAHAM,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 2305.

ARTHUR B. CALLAHAM,

Appellant,

vs.

JOHN B. MARSHALL, as United States Commissioner, etc.,

Appellee.

**Reply Brief of Appellant.**

In our opening brief we discussed the incompatibility of the offices of United States Commissioner and Poll Tax Collector, and showed that the Poll Tax Act imposed upon the Commissioner new duties not contemplated by the Act of Congress creating the office of United States Commissioner, and contrary to the provisions of said Act as well as of the common law (Brief, pp. 8, 9, 10 and 11); that therefore the Poll Tax Act was absolutely illegal, void and of no effect, and that the United States Commissioner, designated as Poll Tax Collector, had no legal right to collect the tax.

We advanced the proposition that the legislature did not intend that the tax should be collected prior

to 1914, or, as has been attempted to be collected, for 1913, and that therefore there is no ground whatever upon which to base the attempted collection of the tax or the criminal prosecution of the plaintiff in error during the year 1913. (Brief, pp. 14, 15, 16, 17, 18 and 19.)

We desire to call the Court's attention again to these propositions which the defendant in error and appellee has failed to seriously disprove.

The only point in the brief of the defendant in error and appellee which we desire to reply to is that of the equitable jurisdiction of the Court in the injunction case.

Since the trial Court wrote no opinion in the injunction case, the record fails to disclose the Court's reason for sustaining the demurrer therein. We, therefore, in our opening brief merely discussed the Poll Tax Act itself, deeming it proper for the defendant in error to raise the jurisdictional question.

The defendant in error has cited but one authority on the point, to wit, 1st High on Injunctions, Second edition, section 485. An examination of the whole of this section discloses the general rule with the various exceptions thereto. The general rule is to the effect that equitable relief will not be granted to prevent the collection of a tax alleged to be void or illegal merely because of its illegality, hardship or irregularity, unless there are some special circumstances attending the collection of the tax which would bring the case within some recognized head of equity jurisdiction. Where, therefore, these spe-



cial circumstances obtain, equitable relief will be granted.

*1st High on Injunctions*, 4th ed., sec. 485.

Our contention is that on account of the peculiar circumstances of this case, which are fully set out in the complaint, the cause is peculiarly one of equitable cognizance. One of the recognized heads of equity jurisdiction is the want of a plain, speedy and adequate remedy at law. In the case at bar such a want exists. An examination of the Poll Tax Act fails to disclose an adequate remedy at law, or any remedy at all, against the collection of this tax should the same be wrongfully collected. There being no plain, speedy and adequate remedy at law, the powers of a court of equity were in this injunction case rightfully invoked. It is not permitted to sue the Territory of Alaska to recover the amount of the tax which might be collected and turned into the territorial treasury under this Act, and the taxpayer is, therefore, without any legal remedy.

*Pyle vs. Brenneman*, 122 Fed. 787.

In a somewhat similar case the Court held that the relief of a single taxpayer in an action at law is so inadequate as to amount to a denial of justice, whereas an equitable suit brought by one taxpayer for himself and all others similarly situated would, by means of one decree, give an entire community relief.

*Williams vs. Grant Co. Court*, 53 Amer. Rep. 94.

In the recent case of *King Co. Washington et al. vs. Northern Pacific Ry. Co.*, 196 Fed. 323, this Court upheld the equitable jurisdiction of the trial

Court on the ground that the enforcement of the tax would cast a cloud upon the company's title, and in the opinion of the Court, the exceptions to the general rule above quoted were noted. It was further held that the collection of an illegal tax could be enjoined where the tax, if paid, would go into the State treasury, and so be beyond reach in an action at law, in which event complainant would have no legal remedy.

"The power of taxation is the power to take from the owner that which is his to help defray the expense of the protection received from the Government, and, if in any case this power is illegally exercised, it is an invasion of private right, and, in the absence of some specific limitation of the remedy imposed by law, the party injured may resort to the courts to vindicate his right against those who attempt such invasion *by any form of action which he could use against any other wrongdoer with respect to the same class of wrongs.*"\*

*Western Union Tel. Co. vs. Trapp*, 186 Fed. 114.  
In another recent case the Court said:

"The adequate remedy at law, which will deprive a court of equity jurisdiction must be as certain, complete, prompt and efficient to attain the ends of justice as the remedy in equity."

*Atchison, T. & S. F. Ry. Co. vs. Sullivan*, 173 Fed. 456.

There can be no doubt that in the case at bar the relief prayed for would be infinitely more certain, complete, prompt and efficient than any legal relief

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\*The italics are ours.

would be, provided relief could be had in an action at law, which we submit could not be obtained.

*Raymond vs. Chicago Union T. Co.*, 207 U. S. 20.

In like manner:

“A suit to enjoin the collection of a tax is recognized as a proper remedy where the tax is unauthorized.”

*Kellaher et al. vs. City of Portland*, 112 Pac. 1076.

In the

*Michigan Telephone Tax Cases*, 185 Fed. 634, where the collector was under the State law made personally liable for the amount of taxes received by him though he remitted the same to the State Treasury, and where the alleged invalid tax on telephone companies constituted a lien on their real estate and cast a cloud on their title, and the tax was alleged to have been illegally assessed, the Court held that complainants' remedy at law by paying the tax under protest and suing to recover the same, was not so adequate and complete as to preclude a resort to equity.

The two cases cited by counsel, to wit: *State vs. Stuht and Hopkins vs. Scott*, are, we submit, not pertinent as authorities in the case at bar for the reason that the Acts, the constitutionality of which was attacked, were similar in no way to our Poll Tax Act, and the reasons assigned by the Courts in their opinions therein are, except in the broadest of generalities, inapplicable here.

We have carefully read these two cases, but have been unable to discover the language in the last para-

graph on page 8 of appellee's brief quoted by counsel as of the same.

For these reasons we request that the judgment below be reversed in both cases.

Respectfully submitted,

ARTHUR B. CALLAHAM,

*In Propria Persona.*

LEWIS P. SHACKLEFORD,

WILLIAM S. BAYLESS,

Z. R. CHENEY,

Attorneys for Appellant and Plaintiff in Error.

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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C. W. LUNG,  
Plaintiff in Error,  
vs.  
UNITED STATES OF AMERICA,  
Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court  
of the Southern District of California,  
Southern Division.

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FILED

FEB 18 1914





United States  
Circuit Court of Appeals

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Plaintiff in Error,

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Assignment of Errors.....	145
Attorneys, Names and Addresses of.....	1
Bench Warrant .....	11
Bill of Exceptions.....	38
Bond to Appear.....	140
Certificate of Clerk U. S. District Court to Transcript of Record.....	157
Citation on Writ of Error (Original).....	4
Demurrer of Defendant C. W. Lung to Indict- ment .....	13
Indictment .....	6
Minutes of Trial—November 22, 1912.....	18
Minutes of Trial—November 26, 1912.....	24
Minutes of Trial—November 27, 1912.....	28
Motion for New Trial.....	33
Motion in Arrest of Judgment.....	34
Motion of Defendant C. W. Lung to Quash In- dictment .....	15
Names and Addresses of Attorneys.....	1
Order Denying Motion to Quash Indictment and Overruling Demurrer, etc. ....	17
Order Denying Motions in Arrest of Judgment and for New Trial and Sentence of Defend- ant Lung .....	36

Index.	Page
Order Enlarging Time to March 31, 1913, to File Record in Appellate Court.....	159
Order Enlarging Time to June 1, 1913, to File Record in Appellate Court.....	160
Order Enlarging Time to August 1, 1913, to File Record in Appellate Court.....	161
Order Enlarging Time to September 1, 1913, to File Record in Appellate Court.....	162
Order Extending Time to File Bill of Exceptions and Fixing Bail Pending Appeal.....	139
Order Settling and Allowing Bill of Exceptions.	138
Petition for Writ of Error.....	143
Plea of Defendant C. W. Lung, Copy.....	17
Praecipe for Transcript of Record.....	155
TESTIMONY ON BEHALF OF PLAIN- TIFF:	
BARNARD, A. G.....	128
BURGESS, FRED H.....	127
ESCALLIER, CHAS. ....	126
GILLMAN, MRS. MARY.....	130
Cross-examination .....	132
Redirect Examination .....	134
JONES, GUS P.....	129
MENDOZA, MARTIN .....	40
Cross-examination .....	68
Redirect Examination .....	86
Recross-examination .....	86
Re-redirect Examination .....	88
Recross-examination .....	91
Recalled—Cross-examination ....	120
Recalled .....	123



**Index.**

**Page**

**TESTIMONY ON BEHALF OF PLAIN-  
TIFF.**

MEYERS, JAMES F.....	124
NOEL, WILLIAM .....	92
Cross-examination by Mr. Andrews...	109
Cross-examination by Mr. McKeeby...	113
Recalled—Cross-examination .....	121
WALLING, HORACE A.....	125

**TESTIMONY ON BEHALF OF DEFEND-  
ANT:**

LUNG, C. W.....	137
Verdict .....	32
Writ of Error (Original).....	1



## **Names and Addresses of Attorneys.**

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Messrs. McKEEBY & REDD, Suite 616 California Building, Los Angeles, California.

For Defendants in Error:

A. I. McCORMICK, Esq., United States Attorney, Los Angeles, California.

EDWARD A. REGAN, Esq., Assistant United States Attorney, Los Angeles, California.

[4\*]

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### **[Writ of Error (Original).]**

*In the District Court of the United States of America, in and for the Southern District of California, Southern Division.*

Case No. 464—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. W. LUNG et al.,

Defendants.

United States of America,—ss.

The President of the United States of America to the Honorable Judge of the District Court of the United States for the Southern District of California, Southern Division.

Because in the record and proceedings and also in the rendition of the verdict and of the judgment of

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\*Page-number appearing at foot of page of original certified Record.

a plea which is in the said District Court before you, between C. W. Lung, plaintiff in error and the United States of America, defendant in error, manifest errors have happened to the great damage of the said C. W. Lung, plaintiff in error, as by his complaint appears.

We being willing that error, if any have happened, should be duly corrected and just and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ so that you have the same at the City of San Francisco, in the State of California on Wednesday, the 26th day of February, 1913, next in the said Circuit Court of Appeals to be then and there held that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error what of right and according to the law and custom of the [5] *of the* United States, should be done.

WITNESSETH: The Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 28th day of January, in the year of our Lord Nineteen Hundred and Thirteen, and of the Independence of the United States, the One

Hundred and Thirty-seventh.

[Seal]

WM. M. VAN DYKE,  
Clerk of the District Court of the United States, for  
the Southern District of California,

By C. E. Scott,  
Deputy Clerk.

The above Writ of Error is hereby allowed.

OLIN WELLBORN,  
United States District Judge. [6]

I hereby certify that a copy of the within Writ of Error was on the 28th day of January, 1913, lodged in the Clerk's Office of the said United States District Court for the Southern District of California, for the said defendant in error.

WM. M. VAN DYKE,  
Clerk U. S. District Court, Southern District of  
California.

By C. E. Scott,  
Deputy Clerk.

Received copy of the within this 28 day of Jan.,  
1913.

A. I. McCORMICK,  
EDWARD A. REGAN,  
Attorneys for Pltff. [7]

[Endorsed]: Original. No. 464—Crim. In the United States District Court in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. C. W. Lung et al., Defendant. Writ of Error. Filed January 28, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk.



*In the District Court of the United States of America, in and for the Southern District of California, Southern Division.*

Case No. 464—CRIM.

THE UNITED STATES OF AMERICA,  
Plaintiff,  
vs.

C. W. LUNG et al.,  
Defendants.

**Citation [on Writ of Error (Original)].**

United States of America,—ss.

To the United States of America and A. I. McCormick, United States District Attorney, Southern District of California, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, on the 26th day of February, 1913, pursuant to a Writ of Error on file in the Clerk's office of the District Court of the United States in and for the Southern District of California, Southern Division, in that certain action wherein the United States of America, Plaintiff and C. W. Lung et al., defendants in error, to show cause, if any there be, why the judgment given, made and entered against the defendant C. W. Lung in said Writ of Error mentioned, should not be corrected and speedy justice should not be done to the parties, defendant in that behalf.

WITNESS, the Honorable OLIN WELLBORN, United States District Judge for the Southern District of California, Southern Division, this 28th day of January, 1913, and the Independence of the United States the One Hundred and Thirty-seventh.

OLIN WELLBORN,

United States District Judge, Southern District of California. [8]

Received copy of the within citation this 28 day of Jan., 1913.

A. I. McCORMICK,  
EDWARD A. REGAN,  
Attorneys for Pltff. [9]

[Endorsed]: Original. No. 464—Crim. In the United States District Court in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. C. W. Lung et al., Defendant. Citation. Filed January 28, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk.

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*In the District Court of the United States of America, in and for the Southern District of California, Southern Division.*

No. 464—CRIM.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

C. W. LUNG, MARTIN MENDOZA, MANUEL MENDOZA, L. W. NOEL, ME HONG, JOAQUIN NAND, and ARTHUR DALY,

Defendants. [10]

## [Indictment.]

*In the District Court of the United States, in and for the Southern District of California, Southern Division.*

At a stated term of said Court, begun and holden at the City of Los Angeles, County of Los Angeles, within and for the Southern Division of the Southern District of California, on the second Monday of January, in the year of our Lord, one thousand nine hundred and twelve,—

The Grand Jurors of the United States of America, chosen, selected and sworn, within and for the Division and District aforesaid, on their oath present:

That C. W. Loung, Manuel Mendoza, Martin Mendoza, L. W. Noel, Me Hong, Joaquin Nand and Arthur Daly, whose full and true names are, and each of them is, other than as herein stated, to the Grand Jurors unknown, being evil-minded persons, heretofore, to wit, on or about the first day of October, in the year of our Lord one thousand nine hundred and eleven, at and within the Southern Division of the Southern District of California, and within the jurisdiction of this Honorable Court, did knowingly, willfully, wickedly, unlawfully, corruptly and feloniously conspire, combine, confederate and agree together and with divers other persons, whose names are to the said Grand Jurors unknown, to commit an offense against the United States, that is to say:

They, the said C. W. Loung, Manuel Mendoza, Martin Mendoza, L. W. Noel, Me Hong, Joaquin

Nand and Arthur Daly, did, at the time and place aforesaid, [11] knowingly, wilfully, wickedly, unlawfully, corruptly and feloniously, conspire, combine, confederate and agree together and with said divers other persons whose names are, as aforesaid to the Grand Jurors unknown, to wilfully, unlawfully and knowingly bring into, and cause to be brought into, and to aid and abet the bringing into, the United States, by land, at divers points and places in the Southern Division of the Southern District of California (the names of which said points and places are to the Grand Jurors unknown), from divers points and places in the Republic of Mexico, to wit, the town of Tia Juana and other points and places in said Republic of Mexico (the names of which other places are to the Grand Jurors unknown), certain Chinese persons (whose names are to the Grand Jurors unknown), to wit, any and all Chinese persons who were then, and those who would thereafter be in said Republic of Mexico, desiring and intending to enter the United States, and which said Chinese persons, as they, the said C. W. Loung, Manuel Mendoza, Martin Mendoza, L. W. Noel, Me Hong, Joaquin Nand and Arthur Daly, and said divers other persons (whose names are to the Grand Jurors unknown), then and there well knew, were not, nor would they be, nor was either or any of them, then and there, nor would they be at any time thereafter, or at all, entitled, permitted or allowed by the laws of the United States, to enter or remain in the United States, and each of which said Chinese persons, as they, the said C. W. Loung, Manuel



Mendoza, Martin Mendoza, L. W. Noel, Me Hong, Joaquin Nand and Arthur Daly, and said divers other persons (whose names are to the Grand [12] Jurors unknown), then and there well knew, was, and at all times in this indictment mentioned and referred to, would be a Chinese laborer and a native of China and a person of Chinese descent, and would not have, and would not be entitled to have, a certificate entitling him to enter, be or remain in the United States.

That said conspiracy, combination, confederation and agreement, between the said C. W. Loung, Manuel Mendoza, Martin Mendoza, L. W. Noel, Me Hong, Joaquin Nand and Arthur Daly, and the said divers other persons (whose names are, as aforesaid, to the Grand Jurors unknown), was, throughout all of the time from and after said first day of October, 1911, and at all times in this indictment mentioned and referred to, and particularly at the time of the commission of each and all of the overt acts in this indictment hereinafter set forth, continuously in existence and process of execution.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That in pursuance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said Martin Mendoza, on or about the 12th day of December, in the year of our Lord one thousand nine hundred and eleven, did leave and depart from the City of San Diego, County of San Diego, within the Southern Division of the Southern District of California, and



go to, and did receive from the said Me Hong and take charge of and control, at or near the international boundary line between the United States and the said Republic of Mexico, near the town of Tia [13] Juana in Lower California, Mexico, one Chin Sing, a Chinese laborer, a native of China and a person of Chinese descent, whose full and true name other than as herein stated, is to the Grand Jurors unknown, and which said Chin Sing did not have a certificate entitling him to enter, be or remain in the United States, and the said Martin Mendoza, did convey and attempt to convey the said Chin Sing from said international boundary line into and through the said County of San Diego in the State, Division and District aforesaid, to the City of Los Angeles, County of Los Angeles, State, Division and District aforesaid.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present:

That in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said L. W. Noel, on or about the 12th day of December, in the year of our Lord one thousand nine hundred and eleven, did leave and depart from the said City of San Diego, State, Division and District aforesaid, and go to Otay, in the said County of San Diego, for the purpose and with the intention of conveying and assisting in conveying, and attempting to convey, the said Chin Sing from the said international boundary line to the said City of Los Angeles, the said L. W. Noel then and there well knowing the

said Chin Sing to have been smuggled and unlawfully [14] and clandestinely brought into the United States from Mexico, as aforesaid, in pursuance and execution of said unlawful conspiracy, combination, confederation and agreement.

Contrary to the form of the statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

A. I. McCORMICK,

United States Attorney.

[Endorsed]: Form No. 456. No. 464—Crim. United States District Court, Southern District of California, Southern Division. The United States of America vs. C. W. Lung, Manuel Mendoza, Martin Mendoza, L. W. Noel, Me Hong, Joaquin Nand and Arthur Daly. Indictment for Violation of Section 37, Federal Penal Code of 1910. Conspiracy to Smuggle Chinese Laborers. A True Bill. E. B. Tufts, Foreman. Presented and filed in open court, this 8th day of March, A. D. 1912. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. 7-703. ———, United States Attorney.

Names of witnesses examined before the said Grand Jury on finding the foregoing indictment:

Bail. C. W. Lung, \$1000. Bail Manuel Mendoza, 1000. Bail Martin Mendoza, 1000. Bail L. W. Noel, 1000. Me Hong, 2500. Joaquin Nand, 2500. Arthur Daly, 2500. [15]

**[Bench Warrant.]****UNITED STATES OF AMERICA.**

Southern District of California,—ss.

To the Marshal of the United States of America,  
for the Southern District of California, and his  
Deputies, or any or either of them, Greeting:

WHEREAS, at a District Court of the United  
States of America, for the Southern District  
[Seal] of California, begun and held at the City and  
County of Los Angeles, within and for the  
District aforesaid, on the 8th day of March, in the year  
of our Lord one thousand nine hundred and Twelve  
the Grand Jurors in and for the said District,  
brought into the said Court a true BILL OF IN-  
DICTMENT against C. W. Loung, Manuel Men-  
doza, Martin Mendoza, Me Hong, Joaquin Nand and  
Arthur Daly, . . . . ., for Violation of Sec. 37, Fed-  
eral Penal Code of 1910 (Conspiracy to smuggle Chin-  
ese laborers) . . . . ., as by the same Indictment,  
now remaining on file and of record in said Court,  
will more fully appear; to which Indictment the said  
above-named defendants . . . . have not yet appeared  
or pleaded;

NOW THEREFORE, You are hereby com-  
manded, in the name of the PRESIDENT OF THE  
UNITED STATES OF AMERICA, to apprehend the  
said above-named defendants . . . and . . each of them  
..bring before the said Court, at the United States  
District Courtroom, in the City and County of Los  
Angeles, to answer the Indictment aforesaid. [16]

WITNESS The Honorable OLIN WELLBORN,  
Judge of the said District Court, and the Seal there-  
of, at the City and County of Los Angeles the....  
9th.... day of.... March...., A. D. 1912.

Attest: WM. M. VAN DYKE,  
Clerk.

By E. H. Owen,  
Deputy Clerk.

A. I. McCORMICK,  
U. S. Attorney.

### MARSHAL'S OFFICE.

United States Of America,  
Southern District of California:

In obedience to the Warrant I have the bod.. of  
the said C. W. Leung 3/23 Arthur Daly ..... be-  
fore the Honorable the District Court of the United  
States, in and for the Southern District of Cali-  
fornia, this 21 day of Meh.... A. D. 1912..

LEO V. YOUNG WORTH,  
U. S. Marshal.  
By J. F. Durlin,  
Deputy U. S. Marshal.

[Endorsed]: Marshal's Criminal Docket No. 4458.  
No. 464. United States District Court, Southern  
District of California, Southern Division. The  
United States of America vs. C. W. Loung, Manuel  
Mendoza, Martin Mendoza, Me Hong, Joaquin Nand  
and Arthur Daly. Bench Warrant. Bail. Defts.  
Loung, Manuel Mendoza, Martin Mendoza fixed at  
\$1000 Each and Defts. Hong, Nand & Daly \$2500  
Each. A. I. McCormick, U. S. Attorney. Filed

March 26th, 1912. Wm. M. Van Dyke, Clerk. By  
Virgil W. Owen, Deputy Clerk. [17]

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*In the United States District Court in and for the  
Southern District of California, Southern Di-  
vision.*

No. 464—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. W. LUNG, MARTIN MENDOZA, MANUEL  
MENDOZA, L. W. NOEL, ME HONG,  
JOAQUIN NAND and ARTHUR DALY,

Defendants.

**Demurrer [of Defendant C. W. Lung to Indict-  
ment].**

Comes now the defendant C. W. Lung and demurs  
to the indictment herein upon the following grounds,  
to wit:

I.

That said indictment does not state facts sufficient  
to constitute a public offense against the laws of the  
United States.

II.

That said indictment is uncertain in this:

(a) That it cannot be ascertained therefrom  
when said alleged conspiracy was formed with suffi-  
cient certainty as to time so as to enable the defend-  
ant to properly prepare and present his defense.

(b) That it cannot be ascertained therefrom  
where said alleged conspiracy was formed with suffi-



cient certainty to enable defendant to prepare properly and present his defense.

(c) That it cannot be ascertained therefrom whether the alleged overt act of defendant Martain Mendoza or whether the alleged overt act of defendant L. W. Noel were one and the same act or were separate and distinct acts of the said alleged conspiracy.

(d) That it cannot be ascertained therefrom whether [18] said alleged overt acts were committed at or near the town of Tia Juana in lower California or whether said acts were committed at Otay in the County of San Diego.

### III.

That the said indictment is unintelligible for the same reasons and in the same particulars that it is uncertain.

### IV.

That the said indictment is ambiguous for the same reasons and in the same particulars that it is uncertain.

### V.

That no evidence was taken before the Grand Jury upon which to base said indictment.

WHEREFORE, defendant prays that said indictment be dismissed and said defendant discharged.

McKEEBY & REDD,

Attorneys for Defendant.

[Endorsed]: Original. No. 464—Criminal. In the United States District Court in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. C. W. Lung,

Martin Mendoza, Manuel Mendoza, L. W. Noel, Me Hong, Joaquin Nand and Arthur Daly, Defendants. Demurrer. Filed April 1, 1912. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Received copy of the within this 1st day of April, 1912. A. I. McCormick, Attorney for Pltff. McKeeby & Redd, Suite 616 California Building. Telephones: Main 2389, Home F 1596, Los Angeles, Cal., Attorneys for Defendant. [19]

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**[Motion of Defendant C. W. Lung to Quash Indictment.]**

*In the United States District Court in and for the  
Southern District of California, Southern Di-  
vision.*

No. 464—CRIMINAL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. W. LUNG, MARTIN MENDOZA, MANUEL  
MENDOZA, L. W. NOEL, ME HONG,  
JOAQUIN NAND and ARTHUR DALY,  
Defendants.

Comes now the defendant C. W. Lung and moves the Court to quash the indictment in the above-entitled case upon the following grounds:

I.

Said indictment does not state facts sufficient to constitute a public offense against the laws of the United States.

## II.

No evidence was introduced before the Grand Jury upon which to base said indictment.

## III.

Said indictment is fatally defective in this; that the names of the witnesses, if any, examined before the Grand Jury have not been indorsed upon said indictment.

WHEREFORE, defendant prays that said indictment be quashed and that he be discharged.

McKEEBY & REDD,  
Attorneys for Defendants.

[Endorsed]: Original. No. 464—Criminal. In the United States District Court in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. C. W. Lung, Martin Mendoza, Manuel Mendoza, L. W. Noel, Me Hong, Joaquin Nand and Arthur Daly, Defendants. Motion to Quash. Filed April 1, 1912. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Received copy of the within this 1st day of April 1912. A. I. McCormick, Attorney for Pltff. [20] McKeeby & Redd, Suite 616 California Building. Telephones: Main 2389, Home F. 1596, Los Angeles, Cal., Attorneys for Defendants. [21]

**[Order Denying Motion to Quash Indictment and  
Overruling Demurrer, etc.]**

At a stated term, to wit, the January Term, A. D. 1912, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Monday, the 22d day of April, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable OLIN WELLBORN, District Judge.

No. 464—CRIM. S. D.

THE UNITED STATES OF AMERICA,  
Plaintiffs,

vs.

C. W. LUNG et al.,  
Defendants.

**Copy Plea of Deft. C. W. Lung.**

This cause coming on this day to be heard on the motion of defendant C. W. Lung to quash the indictment, and on said defendant's demurrer to said indictment; Edward A. Regan, Esq., appearing as counsel for the United States; Geo. L. McKeeby, Esq., appearing as counsel for defendant Lung; and said defendant Lung being present in court; and said motion to quash the indictment and also said demurrer to the indictment having been submitted to the Court for its consideration and decision; it is now by the Court ordered that said motion of defendant Lung to quash the indictment be, and the same here-

by is denied, and it is further ordered that said demurrer of defendant Lung be, and the same hereby is overruled; and defendant C. W. Lung being thereupon required to plead to said indictment, and having plead not guilty as charged therein, which plea is now by order of the court hereby entered herein; it is ordered that said cause be, and the same hereby is continued for the setting of the same down for trial.

[22]

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[Minutes of Trial—November 22, 1912.]

COPY MINUTES OF TRIAL.

At a stated term, to wit, the July Term, A. D. 1912, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Friday, the 22d day of November, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable FRANK H. RUDKIN, District Judge.

No. 464—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

C. W. LUNG et al.,

Defendants.

This cause coming on this day for the trial of defendants C. W. Lung and Arthur Daly before the Court and a jury to be impanelled; Edward A. Regan, Esq., Assistant U. S. Attorney, appearing as



counsel for the United States; defendant C. W. Lung being present on bail, with his counsel Geo. L. McKeeby, Esq., and John B. Redd, Esq.; defendant Arthur Daly being present in custody of the U. S. Marshal, with his counsel, Willedd Andrews, Esq.; and E. Williams having been sworn as shorthand reporter of the testimony and proceedings, and the Court having ordered that the trial proceed, and that a jury be impanelled herein; and the following twelve (12) jurors having been duly drawn, called and sworn on *voir dire*, to wit: W. S. Marshall, Louis Amati, John A. Blumve, James J. McInerney, A. J. Bartlett, O. A. Vickery, John H. Flynn, George F. Mansfield, Nathan P. Bailey, James L. Griffin, W. F. Ball and L. R. Miner; and said jurors having been examined on behalf of the United States by Edward A. Regan, Esq., Assistant U. S. Attorney, of counsel for the United States, and having been examined on behalf of said defendants by Geo. L. McKeeby, Esq., of counsel for defendant C. W. Lung; and John A. Blumve having been challenged for cause by defendants, [23] which challenge is allowed by the Court and the juror excused; and G. L. Davidson, a term trial juror, having been duly drawn, called, sworn on *voir dire* and examined by counsel for the United States and by counsel for defendants; and Nathan P. Bailey having been challenged for cause by the United States, which challenge is allowed by the Court and the juror excused; and Geo. W. Grimes, a term trial juror, having been duly drawn, called, sworn on *voir dire* and examined by counsel for the United States and for the defendants; and O.

A. Vickery having been challenged for cause by defendants, which challenge is allowed by the Court and the juror excused; and S. C. Dodge, a term trial juror, having been duly drawn, called, sworn on *voir dire* and examined by counsel for the United States and for defendants; and L. R. Miner having been challenged for cause by defendants, which challenge is allowed by the Court and the juror excused; and Wm. H. Rorick, a term trial juror, having been duly drawn, called, sworn on *voir dire* and examined by counsel for the United States and for defendants; and the jurors now in the box having been passed for cause by counsel for both sides; and A. J. Bartlett having been challenged peremptorily by the United States and excused; and John D. Mercer, a term trial juror, having been duly drawn, called, sworn on *voir dire*, examined by counsel for the United States and for defendants and passed for cause; and said John D. Mercer having thereupon been challenged peremptorily by defendants and excused; and James W. Johnson, a term trial juror, having been duly drawn, called, sworn on *voir dire*, examined by counsel for the United States and for defendants and passed for cause and said James W. Johnson having thereupon been challenged peremptorily by defendants and excused; and M. C. Marsh, a term trial juror, having been duly drawn, called, sworn on *voir dire*, examined by counsel for the United States and for defendants and passed for cause; and George F. Mansfield, having thereupon been challenged peremptorily by defendants and [24] excused; and Wm. F. Jantzen, a term trial

juror, having been duly drawn, called, sworn on *voir dire*, examined by counsel for the United States and for defendants and passed for cause; and said Wm. F. Jantzen having thereupon been challenged peremptorily by the United States and excused; and C. Milton Adams, a term trial juror, having been duly drawn, called, sworn on *voir dire*, examined by counsel for the United States and for defendants and passed for cause; and Louis Amati having been challenged peremptorily by defendants and excused; and Chas. W. Sanger, a term trial juror, having been duly drawn, called, sworn on *voir dire*, examined by counsel for the United States and for defendants and passed for cause, and said Chas. W. Sanger having thereupon been challenged peremptorily by the United States and excused; and Albert R. Maines, a term trial juror, having been duly drawn, called, sworn on *voir dire*, examined by counsel for the United States and for defendants and passed for cause; and Geo. W. Grimes having been challenged peremptorily by defendants and excused; and Clifford B. Deyeo, a term trial juror, having been duly drawn, called, sworn on *voir dire* and examined by counsel for the United States and for defendants and passed for cause; and said Clifford B. Deyeo having thereupon been challenged peremptorily by defendants and excused; and Jesse V. Neville, a term trial juror, having been duly drawn, called, sworn on *voir dire* and examined by counsel for the United States and for defendants, and said Jesse V. Neville, having thereupon been challenged for cause by the United States, which challenge is allowed by the

Court and the juror excused; and Geo. H. Freeman, a term trial juror, having been duly drawn, called, sworn on *voir dire* and examined by counsel for the United States and for defendants and passed for cause; and said Geo. H. Freeman having thereupon been challenged peremptorily by the United States [25] and excused; and John V. Mills, a term trial juror, having been duly drawn, called, sworn on *voir dire*, examined by counsel for the United States and for defendants and passed for cause; and the twelve (12) jurors now in the box having been accepted by counsel for both sides as the jury to try this cause, and having been duly sworn as the jury to try said cause, said jury as so impanelled and sworn being the following named, to wit:

## JURY:

- |                        |                       |
|------------------------|-----------------------|
| 1. W. S. Marshall,     | 7. John H. Flynn,     |
| 2. Albert R. Maines,   | 8. C. Milton Adams,   |
| 3. G. L. Davidson,     | 9. John V. Mills,     |
| 4. James J. McInerney, | 10. James L. Griffin, |
| 5. M. C. Marsh,        | 11. W. F. Ball,       |
| 6. S. C. Dodge,        | 12. Wm. H. Rorick;    |

—and the Court having admonished the jury not to talk with anyone else or permit anyone else to talk to them about this case or anything connected with it during the progress of this trial, and not to talk with each other about this case or anything connected with it until the same is finally given them for consideration under the instructions of the Court; it is thereupon, at the hour of 12:45 o'clock P. M., ordered that said cause be, and the same hereby is, continued until the hour of 2:30 o'clock P. M. of



this day for further trial. Defendant Arthur Daly is remanded to the custody of the U. S. Marshal.

(At 2:30 P. M.)

No. 464—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

C. W. LUNG et al.,

Defendants.

This cause coming on at this time for the further trial of defendants C. W. Lung and Arthur Daly before the Court and a jury heretofore duly impanelled herein; Edward A. Regan, Esq., [26] Assistant U. S. Attorney, appearing as counsel for the United States; defendant C. W. Lung being present on bail, with his counsel, Geo. L. McKeeby, Esq., and John B. Redd, Esq.; defendant Arthur Daly being present in custody of the U. S. Marshal, with his counsel, Willedd Andrews, Esq.; E. Williams being present as shorthand reporter of the testimony and proceedings; and the roll of the jury having been called, and all being present; and the indictment having been read to the jury and the pleas of not guilty of said defendants stated to the jury by the Clerk; and Edward A. Regan, Esq., Assistant U. S. Attorney of counsel for the United States, having made a statement of what the Government expects to prove; and, on motion of Willedd Andrews, Esq., of counsel for defendant Arthur Daly, the rule as to witnesses having been invoked, it is ordered that all witnesses herein, except Inspector O. F.



Miller be excluded from the courtroom except when they are upon the witness-stand to give their testimony; and Martin Mendoza having been called and sworn as a witness on behalf of the United States, and having given his testimony; and, in connection with the testimony of said witness, the United States having offered the following exhibits, which are admitted in evidence on behalf of the Government, to wit: U. S. Ex. 1, Revolver; U. S. Ex. 2, Revolver, holster and belt; U. S. Ex. 3, card; and U. S. Ex. 4, Receipt for \$300.00; and L. W. Noel having been called and sworn as a witness on behalf of the United States, and having given his testimony; and the Court having given the jury the usual admonition; it is now, at the hour of 5 o'clock P. M., ordered that said cause be, and the same hereby is, continued until Tuesday, the 26th day of November, 1912, at 10:30 o'clock A. M., for further trial. [27]

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**[Minutes of Trial—November 26, 1912.]**

At a stated term, to wit, the July Term, A. D. 1912, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Tuesday, the 26th day of November, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable FRANK H. RUDKIN, District Judge.

No. 464—CRIM. S. D.

THE UNITED STATES OF AMERICA,  
Plaintiffs,  
vs.

C. W. LUNG et al.,  
Defendants.

This cause coming on this day for the further trial of defendants C. W. Lung and Arthur Daly before the court and a jury heretofore duly impanelled herein; Edward A. Regan, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendant C. W. Lung being present on bail, with his counsel, Geo. L. McKeeby, Esq., and John B. Redd, Esq.; defendant Arthur Daly being present in custody of the U. S. Marshal, with his counsel, Willedd Andrews, Esq.; and E. Williams being present as shorthand reporter of the testimony and proceedings, and counsel having stipulated that the jury are present and that the roll of the jury need not be called; and the jury being present in court; and Martin Mendoza, a witness on behalf of the United States, having been recalled for further cross-examination, and having given his testimony; and L. W. Noel, a witness on behalf of the United States, having been recalled for further cross-examination, and having given his testimony; and James F. Meyers, Horace A. Walling, Chas. Escallier, Fred H. Burgess, and A. G. Bernard having respectively been called and sworn as witnesses on behalf of the United States, and having given their testimony; and, in connection with said testimony, [28] the

United States having offered two tickets, Los Angeles to San Diego and return, which are admitted in evidence on behalf of the United States as U. S. Ex. 5 and U. S. Ex. 6, respectively; and Emile Christopher and Gus T. Jones having respectively been called and sworn as witnesses on behalf of the United States and having given their testimony; and Martin Mendoza, a witness on behalf of the United States, having been recalled for further examination, and having given his testimony; and Mary E. Hammel having been called and sworn as a witness on behalf of the United States, and having given her testimony; and the jury, at the hour of 11:45 o'clock, A. M., having been excused, after the usual admonition by the Court, until the hour of 2 o'clock, P. M., of this day; and Geo. L. McKeeby, Esq., of counsel for defendant C. W. Lung, having moved that the Court instructed the jury to acquit the defendants now on trial, and having argued his said motion in support thereof; and Court, at the hour of 12 o'clock, M., having taken a recess until the hour of 2 o'clock, P. M., of this day;

And now, at the hour of 2 o'clock, P. M., Court having reconvened; and counsel and defendants being present as before; and Nellie B. Scott having been sworn as shorthand reporter of the testimony and proceedings; and counsel having stipulated that the jury are present, and that the roll of the jury need not be called; and the jury all being present in court; and Mrs. Gilman having been called and sworn as a witness on behalf of the United States, and having given her testimony; and the Court hav-

ing ordered that defendants' motion that the Court instruct the jury to acquit the defendants now on trial be, and the same hereby is granted as to defendant Arthur Daly, and that the jury are instructed to acquit said defendant Arthur Daly, but that said motion to instruct the jury to acquit be, and the same hereby is denied as to the defendant C. W. Lung; [29] and the Government having rested; and Dora Smith and Jesse F. Booth having respectively been called and sworn as witnesses on behalf of defendants, and having given their testimony; and court, at the hour of 2:45 o'clock, P. M., having taken a recess for 10 minutes; and now, at the hour of 2:55 o'clock, P. M., court having reconvened, and counsel, shorthand reporter and defendant being present as before; and counsel having stipulated that the jury are present and that the roll of the jury need not be called; and the jury being present in court; and S. W. Lung, one of the defendants, having been called and sworn as a witness in his own behalf, and having given his testimony; and, in connection with the testimony of said witness, the United States having offered for identification the following exhibits, which are for identification marked as follows, to wit: U. S. Ex. 7a, letter in Chinese; U. S. Ex. 7b, envelope; U. S. Ex. 8, letter in Chinese; U. S. Ex. 9, letter in Chinese; U. S. Ex. 10a, letter in Chinese; U. S. Ex. 10b, envelope; U. S. Ex. 11a, letter in Chinese; U. S. Ex. 11b, envelope; U. S. Ex. 12a, letter in Chinese; U. S. Ex. 12b, envelope; U. S. Ex. 13, Chinese map; U. S. Ex. 14, letter of Sept. 16, 1911; U. S. Ex. 15a, letter in



Chinese; U. S. Ex. 15b, envelope; U. S. Ex. 16a, letter in Chinese; and U. S. Ex. 16b, envelope; and defendants having rested; and O. F. Miller, Cassius L. Keat and Chan Kiu Sing having respectively been called and sworn as witnesses on behalf of the United States in rebuttal, and having given their testimony; it is ordered that said cause be, and the same hereby is dismissed as to defendant Arthur Daly, and that said defendant be, and he hereby is discharged from custody; and the Court having given the jury the usual admonition, it is, at the hour of 4 o'clock, P. M., ordered that said cause be, and the same hereby is continued until Wednesday, the 27th day of November, 1912, at 10:30 o'clock, A. M.

[30]

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**[Minutes of Trial—November 27, 1912.]**

At a stated term, to wit, the July Term, A. D. 1912, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Wednesday, the 27th day of November, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable FRANK H. RUDKIN, District Judge.

No. 464—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

C. W. LUNG et al.,

Defendants.



This cause coming on this day for the further trial of defendant C. W. Lung before the Court and a jury heretofore duly impanelled herein; no counsel appearing on behalf of the United States; defendant C. W. Lung being present on bail, with his counsel, Geo. L. McKeeby, Esq., and John B. Redd, Esq.; and thereafter Edward A. Regan, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; E. Williams being present as shorthand reporter of the testimony and proceedings; and counsel for both sides having stipulated that the jury are present and having waived the call of the roll of said jury, and the jury all being present; and the Court having sustained the objection heretofore made to certain exhibits offered by the United States; and the Government having rested; and defendant having rested; and said cause having been argued to the jury by Edward A. Regan, Esq., Assistant U. S. Attorney of counsel for the United States; and Geo. L. McKeeby, Esq., of counsel for defendant Lung having been excused from the courtroom for a moment; and thereafter said Geo. L. McKeeby having come into court; and said cause having been argued to the jury by Geo. L. McKeeby, Esq., of counsel for defendant Lung; and [31] said cause having also been argued to the jury in reply by Edward A. Regan, Esq., Assistant U. S. Attorney, of counsel for the United States; and the argument being closed; and the Court having given the jury its oral instructions; and all instructions requested by the parties having been refused, except in so far as the same may be embodied in the oral

instructions given by the Court; and the Court having ordered that exceptions be, and they hereby are noted herein on behalf of defendant Lung to each and every of the instructions given by the Court, and to the refusal of the Court to give each and every of the instructions requested by said defendant and refused by the Court; and the jury, at the hour of 12:04 o'clock, P. M., having retired to consider their verdict; thereafter it is by the Court ordered that said jury be conducted by the U. S. Marshal to some suitable place for their midday meal, said midday meal for jurors and the officers accompanying them to be at the expense of the United States, and that, after said midday meal, the U. S. marshal conduct said jury to their room for further deliberation.

(At 2:45 P. M.)

No. 464—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

C. W. LUNG et al.,

Defendants.

Now, at the hour of 2:45 o'clock, P. M., the jury in this cause having come into court; Edward A. Regan, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendant C. W. Lung being present on bail, with his counsel, John B. Redd, Esq., and the shorthand reporter being present as before; and the roll of the jury having been called, and all being present; and the jurors having been asked if they have agreed upon a ver-

dict, and having by their foreman replied that they have so agreed, and having been required to state their verdict, [32] and their verdict having been read by the foreman; now, by direction of the Court, said verdict is filed and recorded by the clerk, said verdict being as follows, and the following being the record thereof, to wit:

*In the District Court of the United States, for the  
Southern District of California, Southern Di-  
vision.*

No. 464—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

C. W. LUNG, ARTHUR DALY, et al.,

Defendants.

We, the jury in the above-entitled cause, find the defendant C. W. Lung guilty as charged in the indictment.

Los Angeles, Cal., November 27th, 1912.

M. C. MARSH,

Foreman.

And said verdict having been read to the jury as so recorded, and the jurors having said that it is their verdict, the jurors herein are now directed to remain in court for impanellment in another case, whereupon, on motion of Edward A. Regan, Esq., Assistant U. S. Attorney, it is ordered that the bail of defendant C. W. Lung, pending sentence be, and the same hereby is fixed at \$2,500.00, and said defendant is committed to the custody of the U. S.

Marshal until said bail is given; and it is further ordered, on motion of John B. Redd, Esq., of counsel for the United States, that this cause be, and the same hereby is continued until Monday, the 9th day of December, 1912, at 10:30 o'clock, A. M., for the sentence of said defendant C. W. Lung. [33]

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[Verdict.]

*In the District Court of the United States, for the  
Southern District of California, Southern Di-  
vision.*

No. 464—CRIM. S. D.

THE UNITED STATES OF AMERICA,  
Plaintiffs,  
vs.

C. W. LUNG, ARTHUR DALY, et al.,  
Defendants.

We, the jury in the above-entitled cause, find the defendant C. W. Lung guilty as charged in the indictment.

Los Angeles, Cal., November 27th, 1912.

M. C. MARSH,  
Foreman.

[Endorsed]: 464—Crim. U. S. District Court,  
Southern Dist. of Calif., So. Div. United States vs.  
C. W. Lung et al. Verdict. Filed November 27,  
1912. Wm. M. Van Dyke, Clerk. By C. E. Scott,  
Deputy Clerk. [34]

*In the District Court of the United States in and  
for the Southern District of California, South-  
ern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. W. LUNG,

Defendant.

**Motion for New Trial.**

Comes now the defendant C. W. Lung and moves the Court to set aside the verdict theretofore on the 27th day of November, 1912, rendered herein, and for a new trial in this case on the following ground:

I.

That the Court misdirected the jury in matters of law.

II.

That the Court erred in decisions of questions of law arising during the course of the trial.

III.

That the verdict is contrary to law.

IV.

That the verdict is contrary to the evidence.

V.

That the verdict is contrary to law and the evidence.

VI.

That the evidence is insufficient to justify the verdict.



## VII.

This motion will be made upon the files, records and papers in the case and the testimony taken at the trial thereof.

McKEEBY & REDD,  
Attorneys for Defendant.

[Endorsed]: No. 464. In the United States District Court in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. C. W. Lung, Defendant. Motion for New Trial. Filed Dec. 9, 1912. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Received copy of the within this 9 day of Dec., 1912. A. I. McCormick, Edward A. Regan, Attorneys for Pltff. McKeeby & Redd, Suite 616 California Building. Telephones: Main 2389, Home F 1596, Los Angeles, Cal., Attorneys for Defendant. [35]

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*In the District Court of the United States in and for  
the Southern District of California, Southern  
Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. W. LUNG,

Defendant.

**Motion in Arrest of Judgment.**

Comes now the defendant, C. W. Lung, in the above-entitled action and moves the Court to arrest

the judgment in this case for the following reasons, to wit:

I.

That the facts stated in the indictment in the said case do not constitute a public offense against the United States or the laws thereof.

II.

That the facts stated in said indictment do not constitute a violation of any statute of the United States.

III.

Said motion will be made upon the indictment papers, files and proceedings herein.

WHEREFORE, for the reasons apparent in the record the defendant prays that said judgment be arrested.

McKEEBY & REDD,  
Attorneys for Defendant.

[Endorsed]: Original. No. 464. In the United States District Court in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. C. W. Lung, Defendant. Motion in Arrest of Judgment. Filed Dec. 9, 1912. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Received copy of the within this 9 day of Dec., 1912. A. I. McCormick, Edward A. Regan, Attorneys for Pltff. McKeeby & Redd, Suite 616 California Building. Telephones: Main 2389, Home F 1596, Los Angeles, Cal., Attorneys for Defendant.

**Order Denying Motions in Arrest of Judgment and  
for New Trial, and Sentence of Deft. Lung.**

At a state term, to wit, the July Term, A. D. 1912,  
of the District Court of the United States of  
America, in and for the Southern District of  
California, Southern Division, held at the court-  
room thereof, in the city of Los Angeles, on  
Friday, the 13th day of December, in the year  
of our Lord one thousand nine hundred and  
twelve. Present: The Honorable FRANK H.  
RUDKIN, District Judge.

No. 464—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

C. W. LUNG et al.,

Defendants.

This cause coming on this day to be heard on the  
motion of defendant C. W. Lung in arrest of judg-  
ment, and also to be heard on the motion of defend-  
ant C. W. Lung for a new trial, and also coming on  
for the sentence of defendant C. W. Lung; Edward  
A. Regan, Esq., Assistant U. S. Attorney, appearing  
as counsel for the United States; defendant C. W.  
Lung being present, in custody of the U. S. Marshal,  
with his counsel, Geo. L. McKeeby, Esq., and John  
B. Redd, Esq.; and the motions of said defendant  
Lung in arrest of judgment and for a new trial hav-  
ing been argued in support thereof, by Geo. L. Mc-

Keeby, Esq., of counsel for said defendant Lung; and said motions having been submitted to the Court for its consideration and decision; it is now by the Court ordered that the motion of defendant C. W. Lung in arrest of judgment, and also the motion of said defendant for a new trial be, and said motions hereby are denied; and said defendant C. W. Lung having thereupon been called for sentence; and statements in mitigation of sentence having been made by Geo. L. McKeeby, Esq., of counsel for defendant Lung; the Court thereupon pronounces sentence upon said defendant as follows, [37] to wit: The judgment of the Court is, that the defendant C. W. Lung, indicted herein as C. W. Loung, be imprisoned in the United States Penitentiary at McNeil Island, State of Washington, for the term of one (1) year and one (1) day. Defendant is remanded to the custody of the U. S. Marshal. Thereupon, on motion of counsel for defendant Lung, it is ordered that a stay of execution of judgment herein for ten (10) days be, and the same hereby is granted said defendant C. W. Lung. [38]

*In the United States District Court in and for the  
Southern District of California, Southern  
Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. W. LUNG, MARTIN MENDOZA, MANUEL  
MENDOZA, L. W. NOEL, ME HONG, JOA-  
QUIN NAND and ARTHUR DALY,

Defendants.

**Bill of Exceptions.**

Be it remembered that heretofore, to wit, on the 8th day of March, 1912, the Grand Jury of the United States, in and for the Southern District of California, Southern Division, did find and return into the above-entitled court, its indictment No. 464, against C. W. Lung, Martin Mendoza, Manuel Mendoza, L. W. Noel, Me Hong, Joaquin Nand and Arthur Daly, defendants, for a violation of Section 37 of the Penal Code of the United States of 1910, and thereafter, on the 25th day of March, 1912, said defendant, C. W. Lung, appeared in said court with counsel, and was duly arraigned upon said indictment No. 464, and thereafter, on the 22d day of April, 1912, the said defendant, C. W. Lung, appeared in court with counsel, and entered his plea of not guilty to said indictment No. 464, before said court, and thereafter, on the 25th day of November, in the year of our Lord one thousand nine hundred



and twelve, before me, Frank R. Rudkin, Judge of the United States District Court, for the Eastern District of Washington, sitting as Judge for the United States District Court for the Southern District of California, in the City of Los Angeles, within the Southern Division of the Southern District of California, this cause came on regularly for trial, Edward A. Regan, Esq., Assistant United States Attorney for the Southern District [39\*—1†] of California appearing on behalf of the United States and Messrs. McKeeby and Redd appearing on behalf of defendant, C. W. Lung, said defendant, C. W. Lung, being present in court.

Whereupon a jury was duly impaneled and sworn and thereupon the following evidence was introduced on behalf of the United States and on behalf of said defendant Lung.

Said action was continued and on trial from day to day until the 27th day of November, 1912, when the jury was duly charged by said court and retired, and said jury thereafter, on said 27th day of November, 1912, duly and regularly returned into said court their verdict finding the said C. W. Lung guilty as charged in said indictment No. 464.

That thereafter on the 9th day of December, 1912, defendant, C. W. Lung, moving the Court in arrest of judgment, and for a motion for a new trial and which said motions were, on the 13th day of December, 1912, by the said Court, duly and regularly heard

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\*Page number of Original Certified Transcript of Record.

†Original page-number in Bill of Exceptions as same appears in Original Certified Transcript of Record.

and denied, and thereupon said Court duly and regularly pronounced judgment and sentenced said defendant, C. W. Lung, adjudging that he serve a period of one year and one day in the United States penitentiary at McNeil's Island, Washington. Whereupon defendant C. W. Lung petitioned for a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, which said petition was allowed by this Court on the 28th day of January, 1913. [40—2]

**[Testimony of Martin Mendoza, for Plaintiff.]**

MARTIN MENDOZA, witness called in behalf of the United States, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. REGAN.)

Q. Your name is Martin Mendoza?

A. Yes, sir.

Q. Where do you live, Mr. Mendoza?

A. San Diego.

Q. How long have you lived in San Diego?

A. I lived for about seven years.

Q. You were one of the defendants in this charge, indictment No. 464, weren't you?      A. Yes, sir.

Mr. McKEEBY.—If the Court please, we object to that as not the best evidence.

Mr. REGAN.—Why, if the Court please, I spoke to counsel before Court—

Mr. McKEEBY.—Well, I want the record to show.

Mr. REGAN.—Whether or not that was satisfactory; I will produce the records.

(Testimony of Martin Mendoza.)

Mr. McKEEBY.—I don't care to produce the record, Mr. Regan. All I want the record to show is that you have examined the record, and that it was in this case that this man plead guilty.

The COURT.—I presume there is no dispute over that.

Mr. McKEEBY.—We will stipulate this man plead guilty if Mr. Regan says it was in this particular case, your Honor, we will stipulate that it is the fact, but I want the record to show it, not a private agreement between Mr. Regan and myself.

The COURT.—It does show it now. [41—3]

Mr. REGAN.—He testified to it; you have objected; it is not the best evidence.

Mr. McKEEBY.—Does he know whether it is in this case, or the other case? He is charged in two indictments.

Mr. REGAN.—I spoke to you about it before Court convened whether or not it would be satisfactory to prove by this witness he had plead in this case, and you said it would.

Mr. McKEEBY.—If you say it is this case, but I want the record to show it.

The COURT.—This is the same case where the conspiracy is to smuggle Chinamen into this country; that is the case in which you plead guilty, is it?

The WITNESS.—Yes.

Mr. REGAN.—There is another case 463, another indictment which has not been spoken of. I was talking about 464. What do I understand the condition of the record is, this witness testified?

(Testimony of Martin Mendoza.)

Mr. McKEEBY.—Plead guilty in this particular case.

Q. (By Mr. REGAN.) Do you know Mr. Noel, Lewis Noel? A. Yes.

Q. And a man named Mendoza, your brother?

A. Yes, sir.

Q. He is one of the defendants in this action? Me Hong, do you know him? A. I do.

Q. Do you know Joaquin Nand? A. I do.

Q. In the fall of 1911, in November, 1911, where were you living? A. I was living in San Diego.

Q. During that month did you see Mr. Noel?

A. I did. [42—4]

Q. Did you make any trips to Tia Juana that month? A. I did.

Mr. McKEEBY.—Now, if the Court please, we object to this as indefinite. He says during the fall of 1911, and now he is asking him about some months—I would like to have the month designated.

The COURT.—I will let you go into that on cross-examination, if you desire.

Mr. REGAN.—I designated the month of November, did you so understand me, Mr. Mendoza?

A. Yes, sir.

Q. You are talking about the month of November, 1911? A. Yes, sir.

Q. In your trips to Tia Juana did you see Me Hong? A. I did.

Q. Did you have any conversation with him in reference to bringing any Chinamen over into the United States? A. Yes, sir.

(Testimony of Martin Mendoza.)

Q. Now, about that same time did you have any conversation with Noel in reference to bringing Chinamen over into the United States?

A. Yes, sir.

Q. And where did you talk to Noel about bringing Chinamen over to the United States?

A. Why the first time I talked with him was in San Diego.

Q. You had several talks with him, did you?

A. Yes, sir.

Q. And what was Noel's duty with reference to bringing those Chinamen over into the United States?

A. Why, he agreed with me on the proposition.

Q. He ran the automobile? A. Yes, sir.

Q. Now, in November, 1911, did you get Noel to make any arrangements about going down and getting any Chinamen? [43—5]

A. Yes, sir, we did.

Q. And with whom did you make the arrangement about the Chinamen coming across the line?

A. With a Chinaman by the name of Me Hong at Tia Juana.

Q. At Tia Juana? A. Yes, sir.

Q. Was that Chinaman brought across the line?

A. Yes, sir.

Mr. REDD.—Now, if the Court please, we object. I suppose these questions are leading up to a point to establish conspiracy. As I understand this man has plead guilty to being one of the parties to that conspiracy. My understanding of the law is, and that



(Testimony of Martin Mendoza.)

is our objection, that they cannot establish a conspiracy by a co-conspirator.

The COURT.—They can't establish their whole case at once. I will determine whether or not they establish—

Mr. REDD.—Well, I want it understood and have your Honor rule on it at this time, is this, that this evidence will go in subject to a motion to be stricken out unless the conspiracy is established other than by evidence.

The COURT.—I will direct a verdict for the defendant if there is no competent evidence to establish a conspiracy, at the close of the case.

Mr. REGAN.—I understand, if the Court please, that the plea of guilty of the defendant establishes the fact that a conspiracy existed. We cannot, of course, attach every defendant to it, at the outset.

Mr. REDD.—I do not understand the law is whether a plea of guilty—(interrupted).

The COURT.—I have doubts of the correctness of that rule, although I think it was announced by one of our district judges. You may proceed with your testimony. [44—6]

Mr. REDD.—I do not understand that they can establish conspiracy by a co-conspirator, but that evidence may be accepted.

The COURT.—It is competent testimony, but I cannot judge of its sufficiency at this time. Proceed with the examination.

Q. (By Mr. REGAN.) Now, you interviewed Me Hong, did you, about bringing Chinamen over across

(Testimony of Martin Mendoza.)

the line?     A. Yes, sir.

Q. What arrangements were made?

A. Why, the arrangement at that time was to bring him across the line, and bring him here to Los Angeles.

Q. And where were you to get them?

A. Why, at the boundary line—just to get them across and put them in the machine, and bring them to Los Angeles.

Q. That is down on—what do they call that country—that is the Otay Mesa?

A. That is the Otay Mesa and Tia Juana Valley both.

Q. Where were you to bring these Chinamen?

A. Why, here to Los Angeles.

Q. To whom?     A. To C. W. Lung.

Q. To C. W. Lung?     A. Yes, sir.

Q. Whereabouts in Los Angeles?

A. Why, to some stalls here—let's see, there is Alameda or Second Street or Third Street, somewhere around there, I am not acquainted here in the town, and I couldn't tell.

Q. Did you have an address?     A. I did.

Q. Where to bring them?     A. Yes, sir.

Q. A card? [45—7]     A. Yes, sir; a card.

Q. Who gave you that card?     A. Me Hong.

Q. What name did it have on it?     A. W. Lung.

Q. And some address in Los Angeles?

A. Yes, sir.

Q. Now, did you get Mr. Noel to bring a Chinaman up over the line?     A. Yes, sir.

(Testimony of Martin Mendoza.)

Q. About when?      A. On about the—

Q. I mean November.      A. 27th of November.

Q. Somewhere about the 27th of November?

A. Yes.

Q. And how many Chinamen did you bring up?

A. Two.

Q. Where did these Chinamen come from?

A. From Mexico, in Ensenada.

Q. From Ensenada?      A. Yes, sir.

Q. Did you know anybody down at Ensenada?

A. Yes.

Q. Who?      A. Joaquin Nand.

Q. This Chinaman came from Joaquin Nand to Me Hong?      A. Yes, sir.

Q. Then in your possession?

A. In my possession.

Q. How many Chinamen did you and Noel get on this first trip?      A. Two. [46—8]

Q. Two Chinamen?      A. Yes, sir.

Q. And after you put them in the automobile, what did you do?

A. Why, we left there for this town of Los Angeles.

Q. For Los Angeles?      A. Yes, sir.

Q. Did you reach Los Angeles?      A. Yes, sir.

Q. Where did you go when you reached Los Angeles?

A. We got here about two o'clock in the morning, went over and took a lunch first; then about six or seven o'clock we went to the Chinese town, went to that address; then went to the Lung Stalls and saw

(Testimony of Martin Mendoza.)

Mr. Lung and he took me to the place where they were living.

Q. When you got to Lung's place, that was down in one of these stalls, you say?     A. Yes, sir.

Q. Now, when you—

Mr. McKEEBY.—Well, if the Court please, we object to counsel leading the witness here; let the witness go ahead and tell. He has asked him leading questions here and leading questions.

Mr. REGAN.—I think he has already testified to that, Mr. McKeeby.

Mr. McKEEBY.—I know he has testified to that, but let him go ahead and tell what he did, not lead him along and not suggest to him every question he should answer.

Q. After you reached Lung's stall was there any sign there?     A. Yes, sir.

Q. What did it say?

A. C. W. Lung, right along in front of the stalls.

Q. After you got there what did you do?

A. I went there and talked to Mr. Lung.

Q. Did you have anything to give him? [47—9]

A. Yes, sir, I had a letter.

Q. And where did you get the letter?

A. At Tia Juana.

Q. From whom?     A. From Me Hong.

Q. Was it written in English or Chinese?

A. Chinese.

Q. What did you do with that letter?

A. I gave it to Mr. Me Hong or Mr. Lung.

Q. The defendant here?

(Testimony of Martin Mendoza.)

A. The defendant; yes, sir.

Q. What did you do after he gave you the letter—or what did he do after you gave him the letter?

A. He told me to go to Rose Street and deliver those chinks, and he went with me.

Q. How far was that from the Stall?

A. Oh, I think a couple of blocks.

Q. What happened after you got to Rose Street?

A. Why, I went in back of the house in there and put off the two Chinamen. He was in the back door. I met him there and I turned back and went to the stalls again.

Q. Who opened the door of the house?

A. The defendant Lung.

Q. Mr. Lung?      A. Yes.

Q. Then you went back to the stall?

A. Yes, sir.

Q. How did you get any money at that time?

A. I got ten dollars just as we went back to the stall.

Q. What was said about money at that time, if anything?

A. He said the bank was closed at that time of the morning, and for me to come back after the bank opened; he was going to send a girl to the bank and get the rest of the [48—10] money.

Q. And did you come back afterwards?

A. Yes, sir.

Q. Where did you come back to?

A. Came back to the stalls again.

Q. Did you see Mr. Lung?      A. I did.



(Testimony of Martin Mendoza.)

Q. Did you have any conversation with him at that time?   A. Yes, sir.

Mr. McKEEBY.—If the Court please, I think this witness can go ahead and tell everything he did there without being led by counsel that way.

The COURT.—These questions are not leading, if I understand the rule.

Mr. McKEEBY.—Well, I think they are leading, your Honor.

The COURT.—They don't suggest the answer at all.

(Exception.)

Q. Did you have any money transactions with him at that time?

A. When I went back to the stalls; yes, sir; he paid me the rest of the money.

Q. How much did he pay you?   A. \$290.00.

Q. Now, how did he come to pay you \$290.00—that is, I want to know whether you suggested the amount or not?   A. Why, he knew, I suppose.

Q. Did you name the amount?

A. No, sir; I made the contract.

Q. Did you have any understanding as to how much you were to receive?

A. Why, back there at Tia Juana, yes,—not with Mr. Lung, but Mr. Lung seemed to know what he was going to give me. [49—11]

Q. How much,—that was with Me Hong?

A. With Mr. Lung.

Q. Well, I say your understanding back in Tia Juana?   A. Yes.

(Testimony of Martin Mendoza.)

Q. Was with whom? A. With Me Hong, yes.

Q. That you were to get how much a Chinaman?

A. \$150.00 apiece.

Q. Now, after Lung paid you this \$290.00, did you have any conversation with him, then further?

A. Yes, sir.

Q. Along what line?

A. Why, he said he had some more Chinamen in Mexico I could bring for him, he said if I will be careful we can make business maybe, and I also said to be very careful, because if we was caught once and it was proved what we done—also said could make money, could both make money.

Q. Did you have any further conversation with him at that time?

A. Why, he also said he had some opium there to bring across.

Mr. McKEEBY.—Now, if the Court please, we object to any conversation not fixing the time, place and parties present; no foundation laid.

Mr. REGAN.—He is relating the same conversation.

Mr. McKEEBY.—I move to strike out the other conversation until the time, place and parties present are fixed.

The COURT.—I think the conversation is about other matters, and would not be competent anyhow.

Mr. REGAN.—I did not want that. I was after some other.

Q. Was there anything said at that time—I am speaking now of the time Lung paid you the money

(Testimony of Martin Mendoza.)

at his stall—that would be about the 27th of November?

A. Yes, sir; about the 27th or 28th of November.

[50—12]

Q. Do you understand the time I am talking about? A. Yes, sir.

Q. Was there anything said at that time about Joaquin Nand? A. Yes, sir.

Mr. McKEEBY.—Just a moment,—the same objection—no foundation laid as to the parties present, if the Court please.

The COURT.—I don't understand you have to lay a foundation as to the parties present, as to the date, or anything, when you are proving a conversation, except for the purpose of impeachment, and that is not the purpose of this.

Mr. McKEEBY.—I think the law in this State and in the United States is this: the time, place and parties present must *must* be first laid before you can go into it.

The COURT.—I have been in the United States all my life, and that is certainly not the law in the Northern part of the United States, and I will overrule the objection. (Exception.)

(Last question read.)

A. He said it was a party the name of Joaquin Nand there—I knew there too—I saw him and he said he had some Chinamen at Ensenada if Me Hong wouldn't have any at Tia Juana, why, Joaquin Nand would have at Ensenada all so busy, that they bring them in across.

(Testimony of Martin Mendoza.)

Q. Now, after that you left Lung on that day where did you go with reference to your returning to San Diego?

A. Why, we went to San Diego, and we took a trip to Tia Juana again.

Q. And with whom, took a trip to Tia Juana?

A. Mr. Noel.

Q. Mr. Noel and you?      A. Yes, sir.

Q. Whom did you see at Tia Juana?

A. I saw Me Hong, and told him again I would deliver the parties. [51—13]

Mr. McKEEBY.—We object to anything that he may have told Me Hong outside of the presence of either one of these defendants, and move to strike it out.

The COURT.—It may tend to prove a conspiracy; it may connect these parties with it; he can't prove all his case at once. It is not binding upon these defendants or either of them, except in so far as it may tend to establish a conspiracy between the other parties.

Q. Did you, subsequent to November 27th, that trip of November 27th, after that did you make any arrangements about making another trip?

A. Yes, sir.

Q. And about when was that?

A. About the 7th or 8th of December.

Q. 7th or 8th of December?      A. Yes, sir.

Q. And with whom did you make those arrangements?      A. With Joaquin Nand.

Q. With Joaquin Nand?      A. Yes, sir.

(Testimony of Martin Mendoza.)

Q. At Tia Juana?     A. Yes, sir.

Q. And how many Chinamen were you to bring with you?     A. Three.

Q. And bring them from Tia Juana?     Where?

A. To Los Angeles, to here in this town.

Q. Now, were they brought from Tia Juana?

A. Yes, sir.

Q. Where to?

A. To this town here, to Los Angeles.

Q. And whom were they brought by?     By whom were they brought?

A. By Joaquin Nand and Me Hong.

Q. Were they brought to Los Angeles by these two?     [52—14]

A. Right to the International border line, then me and Mr. Noel brought them over.

Q. How many did you bring the second time?

A. Three.

Q. Three?     A. Yes, sir.

Q. What road did you come by on this second trip?     A. On what they call the Inland Road?

Q. The Inland Road?     A. Yes, sir, Temecula.

Q. That took you through Temecula?

A. Yes, sir.

Q. How were they, the Chinamen dressed?

A. In ladies' style, ladies' skirts, ladies' hats.

Q. And did anything happen to you at Temecula?

A. Yes, sir; had a wreck there, one of the wheels broke.

Q. A wreck?     A. Yes, sir.

Q. What did you do after the wreck?     What did



(Testimony of Martin Mendoza.)

you do with the Chinamen?

A. Why, we went, we sent a young fellow to Temecula who was coming right behind us on a wheel—we sent him back to Temecula to get the garage man to help us out, pull the machine where it was, so as to get a wheel there for the machine. We couldn't get a wheel. So we telephoned to San Diego for to get a wheel. About eleven o'clock I think, or half-past eleven, Mr. Walling came with a wheel from San Diego.

Q. Mr. Walling brought a wheel from San Diego?

A. Yes, sir.

Q. And where did you have the Chinamen while you broke down?

A. Why, kind of back in the house there, near where we had the wreck—we put them in there.  
[53—15]

Q. What was there around that house there?

A. Willow trees, brush and stuff.

Q. After Walling brought out this wheel what happened?

A. Why, then we put on the wheel—all we had to do—we had the machine on the jack then—that is all we had to do, put the wheel on the machine, and started and came here to Los Angeles then.

Q. What time did you get in Los Angeles?

A. About seven o'clock the next morning.

Q. Who was with you on this trip?

A. Why, Manuel, my brother, and Noel, Mr. Noel.

Q. And by the way, where is your brother now?

A. Why, he is at home in San Diego.

(Testimony of Martin Mendoza.)

Q. Anything the matter with him?

A. Yes, sir.

Mr. McKEEBY.—If the Court please, we object to that as incompetent, irrelevant and immaterial.

The COURT.—I don't think that is material.

Mr. REGAN.—Well, it might not be at this time; but I think it is competent for the Government to show at some time during the case—

Mr. McKEEBY.—If the Court please, what counsel is going to say I do not think is a proper matter to go before this jury at this present time. If it becomes proper later on we have no objections, but I do not think at this time it is a proper matter to go before the jury.

Mr. REGAN.—What ever the Court does is satisfactory.

The COURT.—I suppose the Government will be criticized for not producing witnesses, and that is a good reason for not bringing them.

Mr. McKEEBY.—I don't think at this time it is competent until they are accused of it.

The COURT.—The trouble is when that criticism comes it will be [54—16] too late.

Mr. McKEEBY.—I am willing to stipulate here that this man's brother is physically incapable of being here at the present time, and that the Government is not to blame.

The COURT.—That is all right then. That covers the ground.

Mr. REGAN.—That says it very clearly and concisely, Mr. McKeeby.

(Testimony of Martin Mendoza.)

Mr. McKEEBY.—I want to be fair, Mr. Regan, but I don't want you to slip things over on me.

Q. You were telling us who was with you on that trip.

A. Yes, sir, Mr. Noel and my brother.

Q. And the three—

A. And the three Chinamen.

Q. Now, where did you go when you reached Los Angeles?     A. We go to 601 East 4th Street.

Q. In this city?     A. Yes, sir.

Q. What did you do after you got there?

A. Why, I jumped off the machine, there and I went to the door and knocked at the door, and a "chink" came there to the door; I had a letter and gave him the letter. He goes back again and brings another fellow. He says, "Where's the chink?" I have got him in the machine there in front door, right by the curb. "Go right around to the back door," he says. I went around to the back door, and the chink goes to the back door and opens the door, and I just pushed him in there, and he says, "Come here at eleven o'clock, and you will get your money."

Q. Where did you get this address 601 East Fourth Street?     A. Of Joaquin Nand.

Q. From whom?     A. From Joaquin Nand.

Q. This letter that you received from Joaquin Nand, and delivered to this Chinaman, was it in English or in Chinese? [55—17]     A. Chinese.

Q. Now, did you return to this house about eleven o'clock?     A. Yes, sir.

(Testimony of Martin Mendoza.)

Q. Before returning to the house, and after delivering the Chinamen did you see Lung?

A. I did.

Q. Where?

A. I saw him at the next corner, I think it is Central Avenue.

Q. How far away from where you delivered the Chinamen?

A. About a block, I think, or a block and a half.

Q. Who was with you when you met Lung?

A. Noel: Mr. Lung was with him.

Q. Did you have a conversation with him at that time?     A. Yes, sir, yes.

Q. What was that conversation?

A. Why, he was standing on the corner there, and was going right by him, around to see him, and then we just stopped right in front of where he was, and he came to the machine and looked in the machine. He says: "You got anything for me?" "No, nothing here." "Now," he says, "I send a letter to Tia Juana, and a letter for you also; we got two 'Chinks' there ready, one at Tia Juana, one Chinese here at San Diego; also some opium; I wish you would go right back there and get them for me." I says, "All right; we go right back."

Q. Now, did you have some further conversation as to when you were going to bring them back?

A. Yes, sir, I told them just as soon as I go back to San Diego—told him that on the—on or about the 11th of December—and they come around with them.

Q. What day of the week was that?

(Testimony of Martin Mendoza.)

A. About Monday, I think—about Monday, I think, if I remember right. [56—18]

Q. Well, what I am talking about now, you understand, I am talking about the conversation you had with Lung. A. Yes, sir.

Q. In that conversation did you say something as to when you were to bring them back?

A. Bring that other right back; yes, sir; I told them that on or about *the* December the 11th.

Q. That you would get them back to Los Angeles?

A. Yes, sir, go to Tia Juana.

Q. And about when was this you had this talk with Lung in Los Angeles here?

A. Well, it was about December the 8th, I think, or about December the 8th.

Q. Did you make any arrangements about seeing Lung in San Diego that time? A. Yes, sir.

Q. What arrangements did you make at that time?

A. He said he will go to San Diego and find out for sure whether this party arrived in San Diego—this Chinaman ready to come we will meet there.

Q. Now, before you left, before you made this second trip, did you see Lung in San Diego?

A. Yes, sir.

Q. And about how long before you left on your second trip?

A. A day or two after we made the second trip.

Q. A day or two before you made your second trip? A. Yes.

Q. And you got to Los Angeles on your second trip about the 8th of December?



(Testimony of Martin Mendoza.)

A. On my second trip?

Q. Yes.      A. Yes, sir, I think so.

Q. Somewhere around that?

A. Yes. [57—19]

Q. And a day or two before that you saw Lung?

A. Yes, sir.

Q. Did you have a talk with him at that time?

A. Yes, sir.

Q. With reference to what?

A. With reference to this party that was in San Diego; he told me he could not come, could not bring him on account of the money was not ready there to be paid for him, so he told me just to go to Tia Juana and get this one chink that was with Me Hong.

Q. Now, after you made your second trip, and after you delivered this Chinaman at 601 East Fourth Street where did you go?

A. I went to San Diego.

Q. Well, before you went to San Diego, where did you go? Did you meet anybody up here in Los Angeles?

A. Yes, I met a fellow by the name of Burgess.

Q. Where did you meet him?

A. I met him at the Jeffries saloon.

Q. On Spring Street.      A. On Spring Street.

Q. Was that before or after you had been paid this money at 601 East Fourth Street?      A. Before.

Q. When you went back to 601 East Fourth Street he was in the machine?      A. Yes, sir.

Q. Did you go to any garage up here in the city at that time?      A. Yes, we did.

(Testimony of Martin Mendoza.)

Q. Where was it do you remember?

A. I don't remember, I don't know the streets here very well; I am not acquainted with the town.

[58—20]

Q. Did you buy anything there?

A. Buyed some gasoline, yes.

Q. What was the condition of your foot that day?

A. I had a sore toe.

Q. And how about your shoe?

A. I had a hole cut off at the toe of the shoe.

Q. Who returned to San Diego with you?

A. This party Burgess, whatever his name is.

Q. Burgess went back with you?     A. Yes, sir.

Q. And Manuel?     A. My brother.

Q. Noel and yourself?     A. Yes, sir.

Q. Did you leave that same day for San Diego?

A. Yes, sir.

Q. Now, after you had gotten back to San Diego, did you again see Me Hong?

A. I saw him the next day, yes.

Q. In reference to what?

A. About the parties we had delivered.

Q. And did you do anything in relation to making this third trip, concerning which Lung had talked to you about?     A. Yes, sir.

Q. And what did you do in reference to that?

A. I told him that I had seen Lung here in Los Angeles, and spoke about this fellow they had there at the restaurant; he was here ready—there was no smoking—well, he can come along, that was on Sunday had him ready; so we went back to San Diego

(Testimony of Martin Mendoza.)

again, and on the following Monday we could not go, and Tuesday I went there.

Q. What did you go down there for Tuesday?

A. To get this Sing. [59—21]

Q. To get Chin Sing? A. Yes, sir.

Q. Did you see Me Hong? A. I did.

Q. Did you have any conversation with him about this Chin Sing?

A. Yes, sir; I talked with him; I says, "I will take him right to the line there for you; that is all right." I went right back to San Diego then and wait for you in the machine.

Q. And did you? A. Yes, sir.

Q. Did you leave San Diego again?

A. Yes, sir, I came back to San Diego—I only started in the evening about—oh, about eight o'clock, I think—I guess about eight o'clock, and then I met Me Hong right by the Mesa, Tia Juana Valley; got this chink got him in the machine; there was also a package of opium; that is the trip we got caught.

Q. And you left immediately for Los Angeles?

A. Yes, sir.

Q. How far did you get?

A. Why, about a mile and a half from Capa Strano, San Juan Capistrano.

Q. Who was in the machine at that time?

A. Noel and I.

Q. And this Chinaman? A. This Chinaman.

Q. Then what happened to you?

A. Why, then a couple of immigration officers there and a deputy sheriff were riding by the grade,

(Testimony of Martin Mendoza.)

flagged us down and we came to a stop. We stopped; then they came back to the machine, and the fellow looked in the bottom of the machine,—what you got in there? They reached in and found this chink—bring him right up, and we had to open the tool-box of the machine, and they got the opium also, then they put us under arrest, and took us back to San Diego. [60—22]

Q. Where were you headed for, where were you going with that Chinaman?

A. We were coming here to Los Angeles.

Q. To deliver him to whom?

A. To C. W. Lung.

Q. To C. W. Lung? A. Yes, sir.

Q. Now, what money did you get on your second trip, the money you received at 601 East Fourth Street, how much did you get?

A. We got \$450.00.

Q. \$450.00? A. Yes.

Q. That is the time you delivered how many Chinese? A. Three.

Q. Now, at the time you were arrested did you have any arms with you?

A. I had a revolver, yes, sir.

Q. You had a revolver? A. Yes, sir.

Q. I show you this revolver, and ask you whether or not that is the revolver you had with you at the time you were arrested. A. This is my revolver.

Q. That is the revolver you had? A. Yes, sir.

Q. Where did you get it and when?

A. I bought it here in Los Angeles at Hoegg's

(Testimony of Martin Mendoza.)

place—the time I made the second trip.

Q. Was Burgess with you at that time?

A. Yes, sir; we left him with the machine; I got him in the store.

Q. Were you there when this outfit was purchased?     A. Yes, sir.

Q. Revolver, belt and cartridge?     A. Yes, sir.

Q. Where was Burgess?     A. At Hoegg's store.

Q. At the same time your gun was purchased?

A. Yes, sir.

Q. Who carried that, if anybody?     A. Noel.

Q. Noel wore that?     A. Yes, sir. [61—23]

Q. At the time of his arrest?     A. Yes, sir.

Mr. REGAN.—Now, I offer in evidence this revolver, No. 156,075, and ask that it be marked United States Exhibit 1.

Mr. McKEEBY.—We have no objection; of course all this evidence is going in subject to the motion to strike out, unless the evidence is properly connected, your Honor.

The same having been admitted in evidence was marked United States Exhibit 1.

Mr. REGAN.—United States Exhibit 2 is a Smith & Wesson, 153,755, to be marked United States Exhibit 2, including the belt and the cartridges.

The same having been admitted in evidence was marked United States Exhibit 2.

Q. (By Mr. REGAN.) Now, referring back to the first time you saw Mr. Lung—that is at the first trip you made, when you saw him at the stall, did you see anybody else there at the stall?



(Testimony of Martin Mendoza.)

A. Why, there was somebody working around there.

Q. What sort of an arrangement did he have for his own office?

A. Why, he had kind of a platform in the corner of the stalls, on the inside, of course, and a kind of office there; it was nothing no walls around him, just the floor.

Q. Was there anybody else there?

A. There was a young lady.

Q. A young lady?      A. Yes, sir.

Q. Have you seen her since?      A. Yes, sir.

Q. Seen her here?

A. Seen her a while ago before the witnesses were—

Q. When you had your conversation with Lung, were you talking near the lady or to one side?

A. A little to one side.

Q. How did he talk? How did Lung talk? Did he talk in an ordinary tone of voice or talk low?

A. Oh, rather low.

Q. Now, at that time, or about that time, at one of these two conversations that you had on your first trip, did he give [62—24] you anything?

A. He gave me a card; yes, sir.

Q. I will show you that card, and ask you whether or not that is the card he gave you?

A. That is the card.

Q. Calling your attention to the writing on that, the American name and the Chinese name, and everything excepting the signature in the lower

(Testimony of Martin Mendoza.)

right-hand corner, do you know who wrote that?

A. Why, Mr. Lung; Mr. Lung gave it to me the way it is.

Q. Mr. Lung gave it to you this way?

A. Yes, sir.

Q. And what did he give you this for?

A. To meet me at Marchessault street.

Mr. REGAN.—I offer this in evidence, and ask that it be marked U. S. Exhibit 3. It reads “D. C. W. Lung, Wing Chong, Hong Sing. I will see you again to-morrow, 309 Marchessault Street.”

Mr. McKEEBY.—Just read the rest of it in also.

Mr. REGAN.—Mark of identification in the upper right hand, Ex. “E” in lower right-hand corner; Signature G. T. Jones—that is, will you stipulate that is the signature of Mr. Jones, the Government Inspector?

Mr. McKEEBY.—I don’t know Mr. Jones. I never heard of him before.

Mr. REGAN.—All right, there is the signature in the lower right-hand corner. There is the name Jones.

Mr. McKEEBY.—There is the name G. T. Jones down there in the lower right-hand corner, D. T. or D. G. or D. F.—something like that.

Q. (By Mr. REGAN.) Now, about December 1st of last year, did you receive any telegram from Joaquin Nand? A. I did.

Q. I will show you this telegram, and ask you whether or not that is the telegram you received from Joaquin Nand.

(Testimony of Martin Mendoza.)

Mr. McKEEBY.—If the Court please, we object to the question in that form, as the telegram he received from Joaquin Nand is the telegram he received.

The COURT.—I will sustain the objection to the latter part of [63—25] the question. Is Joaquin Nand a Chinaman?

Mr. REGAN.—Yes, sir.

Mr. McKEEBY.—I don't know, that is a Mexican name—that he is in the same class as this fellow.

Q. (By Mr. REGAN.) What do they call him for short? A. Joaquin Nand.

Q. What do they call him for short?

A. That is the only name I know of.

Q. They call him Nand? A. Nand, yes.

Q. You received that telegram, you say?

A. Yes.

Q. And about when?

A. About December the 1st, isn't it?

Q. In Spanish? A. Yes, sir.

Q. Will you translate it, please?

Mr. McKEEBY.—If the Court please, we object to this witness translating that telegram. I believe the Court has an official interpreter to interpret such matters.

The COURT.—Yes, I presume as a witness in the case he shouldn't do it. If there was any dispute afterwards, he might see if it were correct or not.

Mr. McKEEBY.—This gentleman here can translate it.

Mr. REGAN.—All right; there is no need inter-

(Testimony of Martin Mendoza.)

preting it; it is not important enough for that.

Q. (By Mr. REGAN.) After your second trip on your return to San Diego, after making your second trip about the 8th of December, did you see Mr. Walling? A. Yes, sir.

Q. Did you have any conversation with Walling at that time? A. We did.

Q. And about what?

A. About arrangements to buy an automobile from him.

Q. For how much? A. For \$1,500.00.

Q. Did you make any payment on it?

A. We did.

Q. How much? A. Three hundred. [64—26]

Q. Three hundred dollars? A. Yes, sir.

Q. Did you get a receipt for it? A. I did.

Mr. McKEEBY.—Of course, we object to that as incompetent, irrelevant and immaterial, your Honor.

The COURT.—I do not see the relevancy of it at the present time.

Mr. McKEEBY.—That is just the idea, your Honor; I suppose this whole testimony can go in, and save the time of this Court, subject to a motion to strike it all out, and to take up the relevancy of it later on.

The COURT.—Very well; that will be satisfactory.

Mr. McKEEBY.—We don't care to take up the time of this Court to quibble about anything; we simply want the facts here.

Q. (By Mr. REGAN.) Is that the receipt?

(Testimony of Martin Mendoza.)

A. Yes, sir.

Q. Do you know whose writing that is?

A. Yes, sir.

Q. Whose?      A. Mr. Walling's.

Q. You saw him write it?      A. Yes, sir.

Q. What did he do with it after he had written it?

A. He gave it to me.

Mr. REGAN.—I now introduce in evidence this receipt and ask that it be marked U. S. Exhibit 4.

Mr. McKEEBY.—I might suggest here, your Honor—I suppose our objection and exceptions are entered to all of this line of testimony.

The COURT.—Yes, that may be understood, Mr. McKeeby.

Mr. REGAN.—Reading from U. S. Exhibit 4 “upper left-hand corner \$300.00, December 8th, 1911, received of L. W. Noel and F. M. Mendoza \$300.00 on account. O. A. Walling.”

The same having been admitted in evidence was marked U. S. Exhibit 4.

Mr. REGAN.—You may cross-examine. [65—27]

Cross-examination.

(By Mr. McKEEBY.)

Q. Mr. Mendoza, what relation are you to Joaquin Nand?      A. None whatever.

Q. Are you the same nationality?      A. No, sir.

Q. No?      A. No, sir.

Q. What is he, a Mexican?

A. He is a Chinaman.

Q. He is a Chinaman, but he has a Mexican name?



(Testimony of Martin Mendoza.)

A. Yes, sir.

Q. Are you a Mexican?      A. Yes, sir.

Q. What are you known in the Chinese language?

A. I haven't any at all.

Q. Haven't you a Chinese name at all?

A. No, sir.

Q. Now, whereabouts in Los Angeles did you first see C. W. Lung?

A. I saw him on the stalls—I think it is on Third or Second or Third and Alameda Street.

Q. On Second, between Second and Third on Alameda Street?

A. It is not between the block—it is either on Third or Second Street.

Q. You are positive of that, are you?

A. Yes, sir.

Q. And what was the sign over his business?

A. C. W. Lung.

Q. C. W. Lung?      A. Yes, sir.

Q. You are sure of that too?      A. Yes, sir.

Q. Now, when was that?

A. That was on or about the 27th or 28th of November, 1911.

Q. Of last year?      A. Yes, sir.

Q. And what was his business there?

A. Why, I could see vegetable business concern there.

Q. You saw him first there in these stalls on Third Street, near Alameda?      A. Yes, sir.

Q. Where did you go from there?

A. We go to Rose Street.

(Testimony of Martin Mendoza.)

Q. What number on Rose Street?

A. I couldn't tell the number on the house. [66—28]

Q. Well, whereabouts on Rose Street, between what streets?

A. Why, I am not acquainted with the streets here, and I couldn't tell.

Q. How many blocks did you go?

A. I should judge about two blocks.

Q. Only about two blocks?

A. Yes, sir; went right on Alameda, and on to Rose Street.

Q. Did Lung go with you on the car?

A. He didn't go on the car; he went through kind of alley, out short through an alley; then he went on Alameda into Rose Street.

Q. Was he with you?

A. He was waiting for me.

Q. You went in the automobile?

A. Yes, sir; he walked.

Q. How long did it take you to get from there over to Rose Street from where you saw him in the stalls?

A. I could not tell you just now; can't remember. We had to come back to Alameda; then went back either to Second Street or—I don't know what street it is; anyway, went back to Rose Street, and he cut across to an alley.

Q. Now, then, you went back to the—did you have these two Chinamen in the car all the time?

A. Yes, sir.

(Testimony of Martin Mendoza.)

Q. They were in the car, were they dressed as women at that time? A. No, sir.

Q. When did they change their clothing?

A. We did not *undress* them as women.

Q. What time of day was that?

A. It must have been about 7 o'clock in the morning.

Q. Who was present at the stalls when you got there? A. Oh, there was a lot of Chinamen there.

Q. Any white people around?

A. A young lady was there, too.

Q. About seven o'clock in the morning?

A. Yes, sir.

Q. Did you see the young lady?

A. I did. [67—29]

Q. Did you speak to her? A. No, sir.

Q. You had never seen Lung before, had you?

A. No, sir.

Q. How did you know—how did you find out which one was Lung?

A. From another chink, from another Chinaman.

Q. From another Chinaman? A. Yes, sir.

Q. That was standing there?

A. He was working there, yes, sir, and I asked him for him.

Q. Then you went over to the Rose Street house?

A. Yes, sir.

Q. Did you get any money at the Rose Street house? A. No, sir.

Q. Where did you go from the Rose Street house?

A. Came back to the stalls again.

(Testimony of Martin Mendoza.)

Q. Did Lung go back with you in the car?

A. No, sir, went back the same way he did when first we came.

Q. Did you go back to the stalls before he did?

A. Yes.

Q. You got back before he did that time?

A. Yes, sir.

Q. But he got over to Rose Street before you did the other time?    A. Yes, sir.

Q. Now, who was present when you got back there? Who was in the car with you?

A. Why, Noel and I.

Q. Nobody else?    A. No, sir.

Q. What had you done with the two Chinese who were in the back of the car?    A. What is that?

Q. Where were the Chinese that were in the back of the car?

A. Left them at this place I have been speaking about, on Rose Street.

Q. On Rose Street?    A. Yes, sir.

Q. Now, where is Rose Street in this city?

A. I can take you there now, but I couldn't tell you where it is, because I am not acquainted in the town here.

Q. Who took you down and showed you where it was?    A. Mr. Lung.

Q. Oh, Mr. Lung took you down, did he?

A. Yes, sir.

Q. Who is Mr. Lung?

A. That defendant there.

Q. I thought you said Mr. Lung went on foot?

(Testimony of Martin Mendoza.)

A. Yes. [68—30]

Q. And you went in the car?

A. Yes, sir; he told us where to go.

Q. Now, did you know where Rose Street was?

A. Because he told us the streets where to go.

Q. And did you follow him?

A. We went around the corner, yes, and we saw him standing on the corner at Rose and Second.

Q. Didn't you tell me he was there at the house waiting for you when you got there? A. Yes, sir.

Q. And you just went around the corner, and followed him all the way? A. Yes, sir.

Q. Have you ever been to that house since that time? A. No, sir.

Q. Have you been down to that house in the last three or four days? A. No, sir.

Q. Where is Rose Street located as regards Los Angeles Street in this city?

A. Well, I couldn't tell you; it is closer to Alameda Street than anything I can think of now.

Q. Now, where is it located as regards Sixth Street? A. I am pretty sure—I can't tell you—

Q. Were you ever down on Sixth Street?

Mr. REGAN.—Wait a minute, have you finished your answer?

A. I am not acquainted in the town, but I can go there and find it.

Q. Were you ever down at Sixth Street?

A. Yes, sir.

Q. Sixth and what? A. Sixth and Alameda.

Q. What were you doing down there?



(Testimony of Martin Mendoza.)

A. Oh, been looking for these Chinamen.

Q. Why did you go to Sixth and Alameda?

A. Well, was looking for some house in there, and I—

Q. Who told you to go down there?

A. Well, I had information from—

Q. Well, who told you?

A. A Chinaman in Ensenada.

Q. Who?     A. Joaquin Nand. [69—31]

Q. What did he tell you?

A. To go and look for a place at Sixth and Alameda.

Q. And you went to Sixth and Alameda?

A. Yes, sir.

Q. What number did he give you down there?

A. Didn't give me a number—he simply gave me the party.

Q. Who was the party?

A. It was written on a piece of paper, and I have lost it.

Q. Well, who was the party?

A. I couldn't tell you the name of the party now.

Q. White man or Chinaman or Mexican?

A. Chinaman, it was a Chinaman.

Q. It was not C. W. Lung?

A. Not the one that Nand gave me, no.

Q. Nand never gave you that name?     A. No.

Q. Never in his life?     A. No, sir.

Q. Never spoke to you about C. W. Lung?

A. He did.

(Testimony of Martin Mendoza.)

Q. I thought you just told me he never gave you the name?

A. He did not give me the name, but spoke to me about it.

Q. He spoke to you about it, but he never gave you his name—how did he talk to you about it, if he never mentioned his name to you—how did he talk to you about it?

Mr. REGAN.—I object to that; the witness never said he never mentioned his name.

The COURT.—The witness can explain his answer.

A. I talked with him, but he never gave me no address that time he spoke with me—spoke of Mr. Lung also.

Q. In your presence?      A. In my presence.

Q. Yes, sir?      A. He spoke to me, yes, sir.

Mr. REGAN.—Who spoke to you—Lung had spoken to you?

A. Yes, sir.

Q. (By Mr. McKEEBY.) Did you ever hear Mr. Nand and Lung talking together?      A. No, sir.

Q. Didn't you just tell me they spoke together?

A. They spoke to me about him, I said. [70—32]

Q. Who spoke to you?      A. Nand.

Q. Nand?      A. Yes, sir.

Q. That is Joaquin?      A. Joaquin; yes, sir.

Q. Spoke to you about this man?      A. Yes, sir.

Q. Did he give you his address?      A. No, sir.

Q. Did he tell you he was at Sixth and Alameda?

A. No, sir; he never told me.

(Testimony of Martin Mendoza.)

Q. Who did tell you he was at Sixth and Alameda?

A. Another Chinaman.

Q. What was the Chinaman's name?

A. Well, I can't tell you; I had it with me.

Q. Can you get it?

A. I do not think so; I lost it or throwed it away.

Q. Did not forget the name of Lung, did you?

A. How is that?

Q. You did not forget the name of Lung?

A. Why, I done some business with him so frequently I didn't get to forget.

Q. You did not forget it because Mr. Connell *tell* you, sitting here, not to, didn't he?     A. No, sir.

Mr. REGAN.—That is objected to.

The COURT.—The witness has answered.

Q. Now, Mr. Mendoza, did you find that man at Sixth and Alameda?     A. No, sir.

Mr. REGAN.—What man are you talking about?

Mr. McKEEBY.—The man that was going down there, he has forgotten.

Mr. REGAN.—Just when was this time? I don't see the materiality of it.

Mr. McKEEBY.—The materiality of it, he was here on this trip, he says he met Lung; he was down there at Alameda hunting for some Chinamen.

Mr. REGAN.—That is not his testimony at all. You asked him if he was ever down at Sixth and Alameda Streets, and he said yes, [71—33] but you are not referring to this time when he was looking for Lung at all, and the purport of your question is not to that time. You asked him if he was ever

(Testimony of Martin Mendoza.)

down at Sixth and Alameda, and he said yes.

Q. (By Mr. McKEEBY.) Where were you at Sixth and Alameda—we will get this straightened out?

Mr. REGAN.—This is objected to as not proper cross-examination, incompetent, irrelevant and immaterial, unless it applies to the time covered by the direct examination, to wit, the time that he made his first trip to Lung, about November the 26th or 27th, 1911.

Mr. McKEEBY.—If the Court please, I think we have got the right to test this witness' memory as to all these statements.

Q. When were you at Sixth and Alameda Streets?

A. Oh, it was a long time ago, about a year and a half ago.

Q. What were you doing there?

A. I was looking as I said for a Chinaman.

Q. Were you bringing a Chinaman in at that time? A. Yes.

Q. Haven't you been in the smuggling business for a good many years?

Mr. REGAN.—I object to that. There is no purpose to that question, except to cast a reflection on the witness. He has not denied he smuggled Chinamen.

The COURT.—It might have some bearing on his credibility.

Q. (By Mr. McKEEBY.) You have been in the smuggling business for a good many years, have you? A. Yes, sir.

(Testimony of Martin Mendoza.)

Q. And have done business with a good many men?      A. Yes, sir.

Q. You never did any business with Lung, except business that you have testified to, did you?

A. Yes, sir.

Q. You did?      A. That is all.

Q. That is the only kind?      A. Yes, sir.

Q. Now, when you were first arrested, didn't you deny that you [72—34] knew Lung?

A. When I was first arrested?

Q. Yes, sir.

A. No, sir; I couldn't deny it on account of the evidence they got on me.

Q. Didn't you deny it?

A. Well, I didn't; I couldn't deny it.

Q. And didn't you send word to me that Lung would pay you money you would swear that you did not know him?      A. No, sir; never done it.

Q. You don't remember that, do you?

A. I remember that I never done it; you never spoke to me or I to you at no time.

Q. I know you never spoke to me, but didn't you send word to me?      A. No, sir.

Q. Well, then I was misinformed. Now, when you came up here, you came up on the 7th of December, did you?      A. About the 7th of December.

Q. With three Chinamen?      A. Yes, sir.

Q. Who was present at that time? Where had you gone?      Who was with you when you came up?

A. Noel and Mendoza.

Q. Manuel?      A. Yes, sir.



(Testimony of Martin Mendoza.)

Q. That is your brother?      A. Yes, sir.

Q. And three Chinamen?      A. Yes, sir.

Q. You delivered those Chinamen where?

A. 601 East Fourth St.

Q. To whom?

A. To another Chinaman who was in the house there.

Q. To Chinaman?      A. Yes, sir.

Q. You did not see any white man around there at all?      A. No, sir.

Q. Who was the Chinaman?

A. Well, I don't know who.

Q. Did you have any orders to deliver them to any particular person?

Q. Yes, I had the address on the letter that Me Hong gave to Nand.

Q. Do you know who that was?

A. Sir? [73—35]

Q. That wasn't C. W. Lung, was it?

A. No, sir.

Q. There wasn't no address, no name on the letter?      A. Just—

Q. Were those Chinamen— (interrupted.)

Mr. REGAN.—Had you finished your answer?

A. No name on the letter, but just written 601 East Fourth Street.

Q. You took the letter there and delivered it to the first man that came to the door?

A. I knocked at the door, and a Chinaman came to the door and I gave him the letter.

Q. Who sent this Chinaman from Mexico?

(Testimony of Martin Mendoza.)

A. Nand and Me Hong both.

Q. Nand and Me Hong?      A. Yes, sir.

Q. Did they tell you whom they were going to?

A. Told me they were going to 601 East Fourth Street.

Q. They did not mention Lung's name though?

A. No.

Q. What time of day was that?

A. About seven o'clock in the morning.

Q. About seven o'clock in the morning and after that what time of day was it that you saw Lung on that day?

A. About—I saw him about ten o'clock.

Q. About ten o'clock?      A. Yes.

Q. Where?

A. About a block and a half from this building East Fourth Street.

Q. Had you remained there at East Fourth Street all day?

A. No, sir, came here to town, around town, and went back there again.

Q. You went back to East Fourth Street again?

A. Yes.

Q. And just happened to run across Lung on the street?      A. Yes, right on the corner there.

Q. Was that the first time that you had ever seen him?      A. No, sir.

Q. Was that the first time that you had ever seen him on that trip?      A. On that trip; yes.

Q. When did you leave Los Angeles on that trip?  
[74—36]      A. When did I leave?

(Testimony of Martin Mendoza.)

Q. Yes.      A. That same day.

Q. Did you get any money?      A. Yes.

Q. Who paid you the money?

A. The Chinaman right on 601 East Fourth Street.

Q. The Chinaman paid you?      A. Yes, sir.

Q. You did not see any white people around there, or talk to any white people at all, did you?

A. No, sir.

Q. And about what time in the afternoon was it, that you left?

A. Oh, we must have left about, either half-past 12 or 1 o'clock.

Q. And who went with you?

A. Why Noel Mendoza and Burgess.

Q. Burgess knew what you were doing up here, did he?      A. Never told him.

Q. He was down there at the house when you got the money that was paid you?

A. Not at the house,—didn't went to the house; he was right on the corner of the block there.

Q. In the machine?      A. In the machine.

Q. What did you tell him you were going to do in the house?      A. I never told him anything.

Q. Did you go into the house alone?

A. Yes, sir.

Q. Where was Noel?      A. On the machine.

Q. Where was Manuel?

A. He was here in town.

Q. He was not with you in the machine?

A. No, sir.

(Testimony of Martin Mendoza.)

Q. You left him up town?     A. Yes, sir.

Q. Did you tell Burgess at that time you were going to get any money?     A. No, sir.

Q. Then where did you go from there?

A. After I got the money?

Q. Yes, sir.

A. Came here to town and bought them guns.

Q. Went up to Hogue's?     A. Yes.

Q. On Main Street, between First and Second and bought those guns? [75—37]

A. On Main Street; I don't know just exactly where.

Q. How do you know these are the two guns?

A. I know them by the numbers.

Q. Did you take the numbers at that time?

A. Yes, sir, I have got the slips of each gun.

Q. Where did you have those slips?

A. I had them in my pocket at the time I was arrested.

Q. You had them still in your pocket at the time you were arrested?     A. Yes, sir.

Q. Now, when did you next see Lung after that?

A. After the second trip?

Q. After the second trip, yes, sir.

A. Why, I seen him in the office of Christian, the Commissioner at San Diego.

Q. That was the first time after the second trip you had seen him, wasn't it?

A. The first time I had seen him.

Q. After the second trip, after this time you met him down there near Central Avenue or some place

(Testimony of Martin Mendoza.)

like that?     A. Oh, no, I seen him.

Q. That was the first time—but I am trying to explain to you, I want you to understand my question, Mr. Mendoza?     A. I see.

Q. After you made the trip and brought three Chinamen to 601 East Fourth Street?

A. Yes, sir.

Q. You saw Lung along about ten or eleven o'clock that day?     A. Yes, sir.

Q. Now, when did you see him the next time?

A. The next time I saw him in San Diego.

Q. Where?

A. At the store of Chung Kee's store, Second Street. Second and J Streets.

Q. That is in San Diego?

A. Yes, sir, in Chinatown.

Q. Who was present at that time?

A. Noel. [76—38]

Q. Who else?

A. Just the defendant Noel and I.

Q. Just you three—what time of day was that?

A. Oh, about 8 o'clock in the evening.

Q. And when was that?

A. That was about the 9th I think, about the 9th, the 8th or 9th of November or December.

Q. Then you never saw him again until you all had the pleasure of appearing before my friend, Christian?     A. Yes, sir.

Q. In San Diego?

A. Yes, sir; in San Diego.

Q. That was after you were arrested?



(Testimony of Martin Mendoza.)

A. Yes, sir.

Q. Did you know where Lung was at that time?

A. Why, no, I did not.

Mr. REGAN.—What time?

Mr. McKEEBY.—I withdraw the question; that is indefinite that is true.

Q. Now, do you know where Lung was at the time you were arrested of your own personal knowledge?

A. Why, I think he was in San Diego.

Q. You do not know that?     A. No.

Q. Did you have any agreement as to where Lung was to meet you?

A. Yes, we had arrangements to meet here, to meet here in Los Angeles; the night I left there he goes to San Diego.

Q. The night you left there?

A. Yes, sir. He left from here to San Diego; I was to run behind.

Q. He went to San Diego?     A. Yes, sir.

Q. You couldn't have met him up here, could you?

A. I couldn't have met him up here, no, sir.

Q. Now, when you went to this store, the stalls, I believe you called it of C. W. Lung, those you saw were down on Third Street?

A. As near as—either Third or Second Street, near Alameda, somewhere in there. I couldn't tell; I can get you there though.

Q. Now, where was this platform you speak of?

A. It was in the back end of the building, on the corner; it is [77—39] on the right; I think it is

(Testimony of Martin Mendoza.)

on the right-hand side as you go to the back of the building.

Q. How high a platform was that?

A. Oh, it is about—

Q. That is, how high from the floor?

A. It is about, I should judge it is about 12 or 15 feet; it is just a small, short stairway to go up *to go up*.

Q. And that was in the back of the store, was it?

A. Yes, on the inside of the back of the stall.

Q. Have you ever been to that store or stall since that time?     A. No, sir.

Q. Never been there but the one time?

A. That is all.

Q. That I believe you say you were twice there and then went over to Rose Street, and then went back?

A. Yes, that is right; those are the only times.

Q. Those are the only times you were ever there in your life?     A. Yes, sir.

Q. And you never saw Lung before in your life?

A. No.

Q. And you never saw him but those three times you have testified to?     A. That is all.

Mr. McKEEBY.—I think Mr. Andrews would be entitled to cross-examine if he desired. I think we could save the time of the Court if we could get it all together.

Mr. ANDREWS.—No cross-examination, your Honor, on our part.

Q. (By Mr. McKEEBY.) You never were down

(Testimony of Martin Mendoza.)

to Sixth and Alameda to see Lung, were you?

A. Not to see him; no, sir.

Q. Never saw him down there at all?

A. No, sir.

Mr. McKEEBY.—That is all.

Redirect Examination.

(By Mr. REGAN.)

Q. Is it your recollection, Mr. Mendoza, that you saw—calling your attention to your second trip about the 8th of December [78—40] it is your recollection you saw Lung in San Diego, after you had returned to San Diego from your second trip?

A. Yes, sir.

Q. Before you made your third trip?

A. Yes, sir.

Q. Your recollection is, you saw him in between that time somewhere? A. Yes, sir, I saw him.

Q. And you had seen him just before you made the second trip, hadn't you, to San Diego?

A. Yes, sir.

Mr. REGAN.—That is all.

Recross-examination.

(By Mr. McKEEBY.)

You say you had seen him before you had made the second trip in San Diego, or before you had made the third trip?

Mr. REGAN.—No, he said before he made the second trip.

A. I seen him here in Los Angeles before I made the second trip, my first trip—when I made the sec-

(Testimony of Martin Mendoza.)

ond trip I saw him here and saw him in San Diego also.

Q. And you saw him before you made the second trip in San Diego?

A. No, after I made the second trip.

Q. Before you saw him, before you made the third trip?     A. Yes.

Q. Before you met the sheriff when you were arrested?     A. Yes.

Q. Well, when you saw him in San Diego?

A. No.

Q. Not before, between the first trip and the trip when you brought the three Chinamen to 601 East Fourth Street?

A. I saw him, yes, after I made the second trip in San Diego also.

Q. You saw him in San Diego, also?

A. Chung Kee's store.

Q. Same place?     A. Yes, sir.

Q. Third Street or Second Street?

A. As near as I could see—I couldn't—

Q. How many times did you see Lung?

A. Well, I saw him then after I made the second trip after San Diego.

Q. Take it straight right from the first, please, Mr. Mendoza, and [79—41] see if I have got this right; if I haven't correct me. Go ahead now—you tell it, start right from the very first time you saw and tell us how many times you saw him and where?

A. About the 27th or 28th of November I saw him here in Los Angeles at the stalls at his place and then

(Testimony of Martin Mendoza.)

on the second trip about the 8th of December I saw him on East Fourth, I think East Fourth and Central, if I remember right; I saw him there in the morning, on either the 8th or 9th, somewhere about there, in the morning about 10 o'clock or 11, between 10 or 11 o'clock, and then I saw him again at San Diego about the 11th of December, then the next time I saw him it was when he was before the Commissioner Christian about the 14th or 15th of December after my arrest.

Q. That is the way I got it; I thought Mr. Regan had it wrong there.

The COURT.—I thought he had got in one extra myself.

Q. He did not see him in San Diego between the first and second trip?

The COURT.—Only saw him twice down there, once when he was under arrest. Is that all?

Re-redirect Examination.

(By Mr. REGAN.)

Q. Let me see if I cannot refresh your recollection. Do you remember before making your second trip—do you remember of having any engagement with Mr. Lung down in San Diego which he did not keep? This is before you made the second trip, between the first and second trip?

Mr. McKEEBY.—We object to that, if the Court please, on the ground it is incompetent, irrelevant and immaterial—same old objection. And on the further ground it is leading and suggestive.



(Testimony of Martin Mendoza.)

Mr. REGAN.—It is for the purpose of refreshing the recollection of the witness. I intend to introduce additional evidence along [80—42] the same line.

The COURT.—You can answer the question. The question is immaterial in itself, unless it leads up to something. Do you recollect?

A. After the first trip do you mean?

Q. (By Mr. REGAN.) After the first trip, and before the second trip, in San Diego, before you left San Diego to make your second trip, do you remember of an appointment down there, that he did not keep? A. Oh, yes; we never met him that you—

Q. Now, wait a minute. Do you remember you had an appointment with him down in San Diego just before you made your second trip?

The COURT.—I don't suppose that is very material anyhow.

Mr. REGAN.—I think it is material, if the Court please. We will have additional evidence to show, tending to show, Mr. Lung was in San Diego at that time.

The COURT.—Do you recall?

A. I think it is the 5th of December that I met him in San Diego after the first trip.

Q. You had an appointment with him in San Diego before your second trip, do you remember?

A. I think I did.

Q. Do you remember whether he kept your first appointment or not?

A. I remember after the first trip here, we had an

(Testimony of Martin Mendoza.)

appointment at San Diego.

Q. Now, can you remember—I am speaking about that appointment—can you remember whether he kept it or not on the day of the first appointment?

A. Yes, I think he did, went there and see me—I remember both went and got a drink of beer in the saloon; I think it was after the first trip.

Q. Let's see if I cannot refresh your recollection further. You remember having this appointment with him between the first and second trip in San Diego?

The COURT.—Answer if you can. [81—43]

Q. I say do you remember between the first and second trip or the first trip, about the 27th or 28th, on your second trip about the 8th of December, you remember in between these two dates, having an appointment with Lung in San Diego?

A. Yes, I think we did.

Q. Well, do you remember that he did not keep the appointment on the first time that it was made, or can you? If you can't remember, say so.

A. I can't remember.

Q. And do you remember his keeping it the next day, a day or two before you left on your second trip?

A. I knew he went there, went there after the second trip, yes, sir.

Q. Now, I am talking about the second trip, do you remember whether or not you saw him a day or two before you made your second trip? If you cannot remember, say so.

(Testimony of Martin Mendoza.)

A. I can't very well remember.

Mr. REGAN.—You do not remember, all right; that is all.

Mr. McKEEBY.—No further questions.

Witness excused.

Mr. REGAN.—There is one question I forgot to ask Mendoza, if I might be permitted to ask him.

The COURT.—Very well, you can ask him where he is.

Witness recalled.

Q. (By Mr. REGAN.) One thing I wanted to ask you, Mr. Mendoza, and that was this: Referring to your first trip, about the 28th of November, do you remember who was with you on that trip to Los Angeles, who came up with you? A. Yes, sir.

Q. Who was in the machine?

A. It was a fellow by the name of Ray Nosa.

Q. A Mexican?

Mr. McKEEBY.—What was the name?

A. Henry Ray Rosa.

Q. He was with you on that first trip?

A. Yes, sir.

Recross-examination. [82—44]

(By Mr. McKEEBY.)

Q. Where is he now?

A. I think he is San Diego now.

Q. Ray Nosa? A. Ray Nosa, yes, sir.

Q. He has never been arrested? A. No, sir.

Q. You had a Chinaman with you at that time?

A. We had two Chinamen with us, yes, sir.

Q. He knew all about it? A. Certainly.

(Testimony of William Noel.)

Mr. McKEEBY.—That is all.

Witness excused.

**[Testimony of William Noel, for Plaintiff.]**

WILLIAM NOEL, witness called in behalf of the United States, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. REGAN.)

Q. State your name in full.      A. William Noel.

Q. Where do you live, Mr. Noel, at the present time?      A. I am residing in Los Angeles.

Q. How long have you lived in Los Angeles—about how long?

A. I have been living in the hospital since the first of August.

Q. You have been what?

A. I have been living in the hospital since the first of August.

Q. Do you know Martin Mendoza?      A. Yes, sir.

Q. And about how long have you known him?

A. I met him in March, 1911.

Q. And you knew him in October and November of 1911?      A. Yes, sir.

Q. You knew him in San Diego?      A. Yes, sir.

Q. And in about October of 1911, or the first of November, did you have a conversation with him in reference to bringing some [83—45] Chinamen across the line?

A. Had a conversation with him about the middle of October.

Q. Of 1911?      A. 1911; yes, sir.

(Testimony of William Noel.)

Q. What was that conversation?

Mr. McKEEBY.—Now, if the Court please, we desire to introduce the same objection to the testimony of this witness, that was introduced to the testimony of the other witness, and I suppose at this time the objection will be overruled, subject to a motion to strike, and our exception will be noted.

The COURT.—Yes, sir. Answer the question.

Q. Just state what the conversation was you had at that time.

Mr. McKEEBY.—It won't be necessary to state all the grounds of our objection?

The COURT.—No.

Mr. McKEEBY.—I don't desire to swell the record here, nor take up the time of the Court.

A. I was traveling on a wheel at that time; I was driving past 8th Street of San Diego and I met Mr. Mendoza, and I stopped and shook hands with him. He asked me what I was doing. I told him I was driving. He said he had a proposition for me, if I wanted to make some money. I asked him what it was, and he told me if I could arrange for an automobile to drive to Los Angeles he could get some Chinamen to carry to Los Angeles. I told him I didn't want to take any chances of getting in any trouble driving Chinamen to Los Angeles. He said I wouldn't get in trouble, because he would see to getting them to San Diego. All I had to do was to drive to Los Angeles. I told him if there was trouble I would agree to go and drive to Los Angeles with the Chinamen, and he said he would make ar-



(Testimony of William Noel.)

rangements to see me later.

Q. Well, now, did you later see him in reference to making trips with the Chinamen?

A. I saw him, I am not sure, whether it was the next day or a [84—46] couple days afterwards.

Q. Did you afterwards see him in November—did you take any trip with him in the last part of November?

A. We made our first trip with him in—it was either the 26th or the 27th, somewhere around there in November.

Q. Did you leave San Diego with him?

A. Yes, sir.

Q. And go down toward the Mexican line, or the International Boundary Line? A. Yes, sir.

Q. And what did you when you got down there?

A. Got down to—I went down to Mendoza's house—

Q. Well, I mean after you left—I don't care about your details about leaving San Diego—but I mean after you left San Diego, went down toward the Mexican line, did you find any Chinamen?

A. There were two Chinamen hid in a lemon orchard down there under the trees.

Q. Who directed you where to go?

A. Mendoza did.

Q. Martin? A. Yes, sir.

Q. Was there anybody there with the Chinamen?

A. There was a Mexican there with them—I don't know who he was.

Q. They were hidden in the lemon trees?

(Testimony of William Noel.)

A. Yes, sir.

Q. That is down across that Otay Mesa, down toward the Mexican Line?

A. Yes, sir; just this side of it.

Q. This was the first trip?      A. Yes, sir.

Q. You afterward made a second trip down toward Otay Mesa?      A. Yes, sir.

Q. Now, what did you do after you found the Chinamen there with this Mexican?

A. They got him to the machine, and laid him down on the floor and covered him up.

Q. Then what did you do?

A. Started for Los Angeles.

Q. And did you reach Los Angeles?

A. Yes, sir.

Q. About what time? [85—47]

A. We reached Los Angeles three o'clock in the morning.

Q. Where did you go when you reached Los Angeles?

A. We drove up to Chinatown, and everything was dark up there; so then we drove to the Pacific Electric garage, 6th and Los Angeles Street, and stayed there until six o'clock in the morning. We left there six o'clock in the morning and went back to Chinatown, and Mendoza got out of the machine to hunt up Lung.

Q. You mean the defendant here?      A. Yes, sir.

Q. C. W. Lung?

A. Yes, sir; he did not know where he was. He had a card with some address down there on, a

(Testimony of William Noel.)

Chinaman, to find out where he was. He came back, and he said he couldn't raise anybody down there, so we drove around a little while, came back again, got off the machine, went down again, and he told me to go up to the Plaza, upon Main Street, and I think came back up there, and told me he found out how to get down to Lung's place at 6th and Alameda Streets.

Q. Did you go down there?

A. Yes, sir; we drove down there.

Q. You went to Lung's place?

A. We went to Lung's place, and we had got out of the machine and walked in the store; I don't know what conversation he had.

Q. Could you see him in the store?

A. I seen him go in the store; I couldn't see him in the store, because I stopped about thirty feet before we got to the store.

Q. Did he come out after that?

A. He came out in about forty-five minutes; Lung came out with him, and told me to drive over to his house.

Q. Lung told you?      A. Yes, sir.

Q. Is that the man here, this defendant?

A. Yes, sir.

Q. Then what did you do?

A. We drove there, and drove to his house, drove around to the [86—48] side of the house, the driveway into the back, and two Chinamen got out of the machine, and Lung took them into the house, and told us to go back to the store, and he would

(Testimony of William Noel.)

meet us over there. We drove back to the store, and Lung didn't show up for about an hour, and Mendoza and I waited there until he got back. Mendoza went inside, and I didn't hear the conversation until later on; it was about all over when I went in to find out what was the matter, why he was so long.

Q. When you went in there whom did you see?

A. I seen Lung and Mendoza.

Q. Anybody else?

A. Well, there was some other Chinamen there—I didn't pay any attention to that.

Q. What happened after you got in?

A. They were talking. Mendoza told me—he says we will have to come back.

Mr. McKEEBY.—We object to any conversation unless it was in the presence of this defendant.

Q. Was the defendant present at this time, was Lung present?

A. Yes, he was talking to Mendoza. Mendoza came over to me—he says: I didn't walk up to you because I seen you talking to him. Mendoza seen me coming in the store. He came over and told me we will have to come back after banking hours to get our money. I told him we will have to get some money so we can get some breakfast, and get our machine ready to go back. He went over and got ten dollars from Lung, and we went downtown and had breakfast, got our machine ready to come back to go to San Diego. We went back to Lung's place about 10:30.

(Testimony of William Noel.)

Q. What happened after you got back?

A. Lung paid him \$290.00, the balance.

Q. Then what happened after that?

A. We went back to San Diego.

Q. Did you see Lung pay him \$290.00?

A. Yes, sir.

Q. Now, did you afterwards make another trip with Mendoza? [87—49]

A. Why, I didn't hear the conversation Mendoza had with Lung.

Q. I say, did you make—

A. When at that time after he was in the store?

Q. But I say, after this first trip in November, did you afterwards make a second trip? A. Yes, sir.

Q. With Mendoza? A. Yes, sir.

Q. When did you make the second trip?

A. Made the second trip on the—we left San Diego on the night—I think it was in December, the 7th, if I am not mistaken; it was right around there; anyway it was in the afternoon, about three o'clock in the afternoon.

Q. Between the first trip and the second trip did you see Lung in San Diego? A. Yes, sir.

Q. You did? A. Yes, sir.

Q. About when in reference to the time of your second trip?

A. Just before we made the second trip.

Q. Just before you made the second trip?

A. Yes, sir.

Q. Did you have an appointment there with Mendoza, have an appointment to meet him?



(Testimony of William Noel.)

A. Yes, sir.

Q. Did he keep the appointment?

A. He didn't keep the first appointment. He said he would meet us there on one night, and he didn't show up, and we went back the next night and he was there.

Q. That was a day or two before you made your second trip?     A. Yes, sir.

Q. Did you have any talk with him at that time with reference to any Chinamen?

A. We had a talk with him. There was one Chinaman they agreed to put up the money for to bring over from some farm, and that was why he was up there, to find out about this money, and they agreed to not put up the money.

Q. From the Chinese farm?

A. From the Chinaman at the farm. [88—50]

Q. He said there was just one Chinaman there and some opium?

A. He said he would let us know later.

Q. One Chinaman where?     A. At Tia Juana.

Q. You have been over at Tia Juana?

A. Yes, sir.

Q. You know Me Hong?     A. Yes.

Q. You have been over there with Mendoza?

A. Yes, sir.

Q. You say you made a second trip with Mendoza?

A. Yes, sir.

Q. About the 7th or 9th of December, you don't know which?     A. The afternoon of the 7th.

Q. In making the trip you left San Diego, of

(Testimony of William Noel.)

course?      A. Yes, sir.

Q. With whom?

A. With Martin Mendoza and Manuel and myself, and the three Chinamen.

Q. Well, I know, but before you got the Chinamen, I mean. You left the city of San Diego to get the Chinamen?      A. Yes, sir.

Q. And went down toward the Mexican line?

A. Yes, sir.

Q. On that Otay Mesa there?      A. Yes, sir.

Q. And what did you find?

A. Three Chinamen.

Q. And who directed you to find them?

A. Manuel was in the machine, and I don't remember whether Manuel or Martin directed.

Q. Do you remember the condition of Martin's foot that day?

A. He had an ingrowing toenail; he was in very bad condition; he couldn't walk.

Q. You found three Chinamen?      A. Yes, sir.

Q. What did you do with them?

A. Took them and put them in the machine and started for Los Angeles about three o'clock in the afternoon.

Q. Which way did you go?

A. Took the Inland Road.

Q. Did you go through Temecula?      A. Yes, sir.

Q. How were the Chinamen dressed?

A. Two of them were dressed as women.

Q. How was the third one dressed? [89—51]

A. The third woman was not dressed at all—he

(Testimony of William Noel.)

had his old clothes on lying on the floor.

Q. Why didn't you dress him up as a woman?

A. He had a queue, and we did not want him sitting up in the machine.

Q. Pig-tail?      A. Yes.

Q. What happened at Temecula, if anything?

A. About a mile and a half north of Temecula we speeded in a mud puddle and ran into a ditch and broke the left back wheel.

Q. Now, after the accident what did you do with the Chinamen?

A. Why, the accident happened about four o'clock, and Manuel got out of the machine with the three Chinamen and took them down to the willows—a little creek runs along there, and I never seen Manuel any more until about seven o'clock that evening. We had lunch there. I went to Temecula at six o'clock, telephoned for another wheel and—

Q. Did another wheel come?

A. Another wheel got there about 11:30 that night.

Q. Who brought it?      A. Mr. Walling.

Q. Mr. Walling?      A. Yes, sir.

Q. Is he the man you hired the machine from?

A. Yes, sir.

Q. For the first trip?      A. Yes, sir.

Q. Paid him for the first trip?      A. Yes, sir.

Q. How much?      A. Seventy-five dollars.

Q. After you had made repairs at Temecula, did you come on to Los Angeles?

A. Yes, sir; left Temecula at a quarter to twelve that night.

(Testimony of William Noel.)

Q. What time did you get to Los Angeles?

A. We got to Los Angeles about seven o'clock on the morning of the eighth.

Q. Where did you go?

A. Went to Fourth and Central.

Q. To Fourth and Central?

A. Yes, sir. [90—52]

Q. Well, what happened after you got to Fourth and Central?

A. Martin told me to stop at Fourth and Central and he would go and see about where to deliver the Chinamen.

Q. Where were you going to deliver the Chinamen? A. 601 East 4th.

Q. Did you deliver them there? A. Yes, sir.

Q. Drove them up in the machine?

A. Drove them up to the side of the house; the Chinamen got out of the machine and he drove them in the back door.

Q. What did you do after you delivered the Chinamen there?

A. After we delivered the Chinamen, Mendoza came to me, and he says, we would have to go up in Chinatown, and hunt up somebody that was to receive the Chinamen, and we followed up,—I drove up the Plaza. Mendoza went down to Chinatown, and he finally came back and told me he found the man; he said he was out there at the corner of the Plaza and Los Angeles, and I drove down there, got the Chinamen in the machine and drove back to Fourth and Central. The Chinamen got out of the

(Testimony of William Noel.)

machine, and the Chinamen went up to 601, I suppose—I didn't see where they went. Mendoza came back later and told me we would have to come back for the money at eleven o'clock; so I says, "All right."

Q. Did you come back at eleven o'clock?

A. We came back at eleven o'clock.

Q. Now, before you came back at eleven o'clock, that is, after you delivered the Chinamen, and before you came back at eleven o'clock, did you see Lung up there?

A. After we delivered the Chinamen we was there at Fourth and Central, as we started off we met Lung.

Q. Did you have any conversation with Lung?

A. Lung asked us—looked in the machine, and asked us what we had. We told him we didn't have anything for him; and we asked him, Mendoza and Martin, if he had received his letter, and Martin said no; Lung said he wrote a letter to Martin and also one [91—53] to Me Hong, and Martin said, "I guess I will get the letter when I get back"; so Lung said he had one Chinaman and 150 cans of opium at Tia Juana, and he wanted us to bring them right through; so we agreed to come right back with him.

Q. Did you mention any time as to when you would probably be back with them?

A. I told him we would be back on the following Monday or Tuesday.

Q. After leaving Lung there did you go to—you went back to the house, 601, and told him?



(Testimony of William Noel.)

A. No, we went downtown and had our machine fixed up first, ready to go back.

Q. Is that the trip you met Burgess on?

A. Yes, sir.

Q. Was Burgess with you when you met Lung?

A. No, sir.

Q. Where did you meet Burgess?

A. We drove up to Jeffries' saloon and washed up our face and hands and cleaned up a bit, then we went and had breakfast. While at Jeffries' saloon, why we met Burgess; I had known Burgess for a number of years when I was here before.

Q. He joined you, did he?

A. He joined us there.

Q. Was he with you when you went back to the house about eleven o'clock?      A. Yes, sir.

Q. At that time what happened with reference to the money?

A. At the time we drove down Fourth and Central about eleven o'clock with Martin, Manuel, Burgess and myself in the machine, and Martin got out and went up to 601, I presume,—I don't know where he went—and while he was gone I was doing a little fixing around with the machine, ready to go back; he came back in about ten minutes, and I asked him if he had the money, and he said everything was all right; he had it so we went downtown and bought those guns at that time.

Q. Those guns that you see here?      A. Yes, sir.

Q. United States Exhibits 2 and 3? [92—54]

A. Bought them at Hoegee's that afternoon before

(Testimony of William Noel.)

we went back to San Diego.

Q. Burgess was with you?

A. Well, Burgess and Manuel were in the machine.

Q. Well, I mean they were with you in the machine with you at that time?      A. Yes, sir.

Q. Then what did you do with reference to going to San Diego?

A. Then we went back to San Diego. On the way back we was going back the Coast road, but the Chinamen had lost a Chinese Dictionary while they were there, when we broke down and we went back to find this Chinese Dictionary. That is the reason we went on the Inland road.

Q. At Temecula?

A. Yes, sir; we got back to Temecula that night and looked for it but could not find it.

Q. You did not find it?

A. We did not find it, no, sir; so we went back to San Diego.

Q. Now when did you get back to San Diego, about when?

A. Maybe around 7 or 8 o'clock somewhere around there.

Q. That would be about the 8th or 9th you got back to San Diego?      A. On the night of the 8th.

Q. Did you afterwards make a third trip with Martin?      A. Yes, sir.

Q. Oh, yes, after the second trip you went to the garage, didn't you?

A. Went to the Premier Garage.

Q. Buy some supplies there?

(Testimony of William Noel.)

A. Bought some oil and gasoline.

Q. Was anything the matter with the machine?

A. I had a leak in my gasoline pipe and I wanted to get it fixed. They didn't have time to fix it or it would have been too much trouble and I told them to give me some soap and I would soap the leak myself temporarily.

Q. Did you have some conversation with one of the men there at the garage; did he make some remark?

[93—55]

A. One man asked me—the machine was all dusty—he says, “You look like you had been out in the country.” I said, “Yes, we are going again.” I don't remember where I told him, whether I told him where we were going or not.

Q. Now, with reference to this third trip, who was with you on this third trip?

A. That we were arrested?

Q. Yes, who left San Diego with you?

A. Martin.

Q. To go and get the Chinamen? A. Yes, sir.

Q. Who directed you where to get the Chinamen?

A. We both knew where to go, Martin had told me.

Q. You say, who told you? A. Martin told me.

Q. Had Martin been down to Tia Juana before that?

A. Yes, sir, had been there that afternoon.

Q. That same day? A. That afternoon.

Q. And you left San Diego and went down towards the International line, down on the Otay Mesa?

A. Yes, sir.

(Testimony of William Noel.)

Q. About what time did you find the Chinamen, or get to where the Chinamen were?

A. About 8 or 9 o'clock in the evening.

Q. When was this?      A. The night of the 12th.

Q. The night of the 12th of December, 1911?

A. Yes, sir.

Q. You and Martin?      A. Yes, sir.

Q. And what day of the week was that, do you remember?      A. Tuesday night.

Q. And you found the Chinamen there?

A. Yes, sir.

Q. And what did you do?

A. The Chinamen got in the machine, and we started back to San Diego, or for Los Angeles.

Q. By what route?      A. The Coast road.

Q. By the Coast road?      A. Yes, sir.

Q. Now, prior to that, had you had some conversation with Martin about his going down and getting these Chinamen over?

A. Martin told me that he would attend to getting him over. [94—56]

Q. He had told you that before you went down and got this Chinaman?      A. Yes, sir.

Q. Now you started for Los Angeles, about what time?

A. About 9 o'clock Tuesday evening.

Q. And you were arrested about that time?

A. About 1 o'clock in the morning, on Wednesday morning, the 13th.

Q. Do you know who arrested you?

A. Jones is the only man that I know; there was

(Testimony of William Noel.)

five of them all together.

Q. And where did this arrest happen?

A. Just about five miles south of San Juan Capistrano.

Q. You were taken back where?

A. Taken back to Capistrano, telephoned there, and left there about 3 o'clock in the morning and went back to San Diego.

Q. The Chinaman was there, this Chin Sing?

A. Yes, sir.

Q. You say you paid \$75.00 to Mr. Walling on your first trip?      A. Yes, sir.

Q. Did you pay him anything on the second trip?

A. \$50.00.

Q. Did you make any arrangements about buying a machine?

A. I made arrangements. I asked him what arrangements he could make with me for buying a machine, and he asked me how much I could pay down, and I asked him what he wanted, and I told him that I would give him \$500.00 down, and the balance in about ninety days. The machine was to cost us \$1800.00, if I am not mistaken, I am not sure.

Q. Did you pay him any money?

A. We paid him \$300.00 down.

Q. Who paid him that?      A. Mendoza.

Q. Got a receipt?      A. Yes, sir.

Q. Showing you United States Exhibit 4, I will ask you if that is the receipt he gave Mendoza.

A. Yes, sir.

Mr. REGAN.—I think that is all for direct exam-



(Testimony of William Noel.)

ination. If I have overlooked anything I shall ask permission to ask a question or [95—57] two in reference to it.

Cross-examination.

(By Mr. ANDREWS.)

Q. Mr. Noel, as a matter of fact, you have never had any agreement, have you, with Mr. Lung?

A. Not myself, personally, no, sir.

Q. The conversations that you related were with Mr. Martin Mendoza, were they not? A. Yes, sir.

Q. Mr. Lung never promised you personally any money for anything, did he?

A. No, sir, I never had any conversation with Mr. Lung myself, at all.

Q. Do you recall when you and Mr. Mendoza went down to Sixth Street, the market of the Chinaman?

A. Yes, sir.

Q. When was that? A. The first trip.

Q. Yes?

A. It was on or about November 26th or 27th.

Q. You found some stalls there? A. Yes.

Q. Can you describe the stalls to the jury?

A. Well, there is a market there, there are stalls, and some kind of short strips run right straight through, and the stalls are all boarded, but the stalls open on both ends off of Sixth Street and back to a square place, a big lot there on the back; you can look right through stalls from one street to another. I never paid much attention to the rest of them. We drove right where Lung's sign was, great big wire in

(Testimony of William Noel.)

front of the place, and I stopped just before we got to it, about thirty feet from it.

Q. Did you make a trip down there to Second and Rose Streets?     A. Third and Rose.

Q. Third and Rose?     A. Yes, sir.

Q. What is that place?

A. Why it is a little cottage right on the corner.  
[96—58]

Q. Do you remember the number, Mr. Noel?

A. No, I don't, three hundred and something, if I am not mistaken. I do not remember what the number was.

Q. Which trip was that?     A. First trip.

Q. Who was present at that time?

A. When we went to the house?

Q. Yes.

A. There was Martin Mendoza, myself and the Mexican that was with us—I don't know what his name was; I never seen him before, and Mr. Lung.

Q. Did you go over there to the market in the machine?     A. Yes, sir.

Q. And Mr. Lung with you?     A. No, sir.

Q. What did he do?

A. We left him there at the house; he told us to meet him at the market and we drove back to the market, and wait for him.

Q. How did you go from the market to the house?

A. Drove the machine.

Q. Who was with you?

A. Mendoza and myself and two Chinamen and the Mexican.

(Testimony of William Noel.)

Q. Mr. Lung was not with you at that time?

A. No, sir; he said he would meet us there.

Q. When you went over to the market—you have stated, have you not Mr. Noel, Mr. Lung stayed at the house at Third and Rose, when you all went there to the market?

A. We left him at the house; we went to the back door with the Chinamen.

Q. And went out the front?

A. We turned around in the back yard and went out the front. He told us to meet him at the market.

Q. Did you wait for him until he came.

A. We waited for him at the market until he came.

Q. He came after you arrived?      A. Yes, sir.

Q. That is you arrived first?      A. Yes, sir.

Q. In what direction did he approach you? [97—59]

A. I don't know because I did not go inside. Mr. Mendoza went in.

Q. You had no conversation inside with Mr. Lung?

A. No, sir.

Q. Now, what did you do on your second trip in Los Angeles?      A. You mean when I got here?

Q. Yes.

A. We stopped at Fourth and Central and Martin told me—he said he would go and see about delivering the Chinamen.

Q. But you did not see where he went to, did you?

A. I didn't see where he went to, no.

Q. So, so far as you know, you cannot state to the jury, just what he actually did?

(Testimony of William Noel.)

A. I don't know what he did or where he went; all I know is, where he came back and directed me to go.

Q. Do you remember how long an interval it was between the time he left you, and when he got back to Third and Central?

A. Probably about fifteen minutes to half an hour.

Q. About half an hour?

A. I wouldn't say for sure.

Q. This was on the 8th day of December?

A. Yes, sir; the morning of the 8th at seven o'clock.

Q. What time in the morning?

A. About seven o'clock.

Q. And the Chinaman was still in the machine?

A. Yes, sir.

Q. What was done with the Chinaman after that?

A. He came back and told me to drive to 601 East Fourth Street, and I drove up there. He told me to drive in at the side of the house towards the back door, and I drove in there; the Chinaman got out and walked in the back door.

Q. That was about 9 o'clock?

A. Oh no, that was just about 7:30.

Q. That was about 7:30?

A. Yes, sir; in the morning.

Q. On the 8th day of December?

A. December, 1911.

Q. You know the neighborhood there, do you not, pretty well?

A. Well, no not—I can't say that I do.

(Testimony of William Noel.)

Q. You remember there is a fire engine house there on the corner? [98—60] A. Yes, sir.

Q. Right across from this 601 East Fourth?

A. Yes, sir.

Q. Whom did you see when you got there?

A. There was a fireman standing out in front of the engine house.

Q. Whom did you see at 601 East Fourth?

A. I didn't see anybody.

Q. Did you deliver the Chinaman, Mr. Noel?

A. I drove the machine, that is all.

Q. Did the Chinaman go in alone, or did somebody go with him?

A. Why, Mendoza was standing there, and told him where to go in the door.

Q. In the back door? A. Yes, sir.

Cross-examination.

(By Mr. McKEEBY.)

Q. Now, Mr. Noel, when you first arrived in the city, on your first trip, that was the 26th or the 27th of November? Did you go directly to the market?

A. No, sir.

Q. You went where? A. Went into Chinatown.

Q. And where did *you in* Chinatown?

A. Why, I drove right straight up Alameda Street, and Mendoza got out at Marchessault Street.

Q. Do you know where he went?

A. I don't know where he went.

Q. Then, if I remember correctly, you said you went back to the Pacific Electric Garage?



(Testimony of William Noel.)

A. Yes, sir; it was so dark, and we couldn't get in anywhere there.

Q. Then you went back to Chinatown again?

A. Yes, sir.

Q. About what time?

A. Oh, a little after six in the morning, along about 6:30.

Q. And where did you stop that trip?

A. Well, I didn't stop; Mendoza got off at Chinatown again and I went north on Main Street—I don't know how far north I went—I drove up and came back. [99—61]

Q. Had the Chinaman in the auto all the while?

A. Yes.

Q. What time did you meet Mendoza when you came back?     A. It was about fifteen minutes.

Q. Then where did you go?

A. He said he couldn't raise anybody.

Q. Oh, that was the second time—that was after six o'clock, I am speaking of, when you drove north on Main Street, and he got off and went into Chinatown, and came back, and said he couldn't raise anybody.

A. Yes, he got off the first time and said he couldn't raise anybody; came back and got in the machine, and we drove around town and went back again about seven o'clock.

Q. About seven o'clock?

A. He got off. He told me, he says, "You go up and wait at the Plaza; it won't do to drive it around here too much," so I went up to the Plaza, and waited

(Testimony of William Noel.)

right in front of the picture show on Main Street.

Q. How long did he wait there?

A. Probably half an hour.

Q. Making it about eight o'clock?

A. About eight o'clock.

Q. Then where did you go?

A. Martin came up, and he told me, he says—no, no, he came back and got in the machine on Alameda Street; it was after we had delivered the Chinamen that I met him and waited.

Q. That was the second time he came back was it—what did you do after you, after he came back, took the Chinaman down the third time, I think it was, you went in there early in the morning?

A. He told me to go to Sixth and Alameda Street.

Q. You didn't go to the market on Second or Third Street, did you, and Alameda?

A. No, I don't think we went in the market there.

Q. You never went there and delivered any—

A. Not to Third Street—I don't know whether it is Third or Sixth; it is Sixth Street where the market is; there is no [100—62] market on Third Street.

Q. Then you went to the market on Sixth and Alameda?     A. Yes, sir.

Q. And there you saw C. W. Lung, did you?

A. Yes, sir.

Q. Did you know him?     A. No, sir.

Q. Did Martin know him?     A. No, sir.

Q. How did you know whom you were after?

A. Why, Martin went out, or got out of the machine, and went inside; he was in there about forty-

(Testimony of William Noel.)

five minutes, and he came out with Lung.

Q. Then what happened?

A. And Lung said he did not know where to take him out of the machine, and finally agreed to go over to his house at Third and Rose Street. He told me to drive over there and he would walk over; and we drove over, and drove around to the back door.

Q. He was at the back door by the time you got there? A. Yes, sir.

Q. And he walked there?

A. He cut through; there is a little gangway that goes through there from Market.

Q. Did you know where Third and Rose was at that time? A. Yes, sir; I did.

Q. You had driven in this city, had you?

A. I drove here for three years.

Q. And for whom? A. For Harry Burke.

Q. For Harry Burke? A. Yes, sir.

Q. And then you went to San Diego?

A. Yes, sir.

Q. Were you driving in the rent service in San Diego? A. Yes, sir.

Q. You are a married man are you?

A. Yes, sir.

Q. Where does your wife reside?

Mr. REGAN.—That is objected to as incompetent, irrelevant and immaterial.

The COURT.—Probably it is; he may answer.

A. Well, I don't know that it is—it is a family affair, and I [101—63] don't know that it is necessary.

(Testimony of William Noel.)

Q. Well, that doesn't answer the question.

Mr. REGAN.—I don't know what it involves; if the Court can conceive of its being material—

The COURT.—Unless there is some materiality about it, he needn't answer the question.

Mr. McKEEBY.—I will withdraw it, with the privilege later on of recalling it.

The COURT.—Very well.

Q. Now, when you came up on your second trip, Mr. Noel, you had broken down right near Temecula?

A. Yes, sir.

Q. What did you do with the Chinese?

A. Manuel took the Chinese and went to the willows with them.

Q. Just kept them there in the willows, did he?

A. I don't know; after he left the machine I didn't pay any attention to him, because I was looking out, getting the machine ready to get on the way again.

Q. Where was Martin?

A. Martin was there with me, and helping me.

Q. He stayed right with you all the time, did he?

A. Yes, sir.

Q. You had some little lunch there that evening, didn't you?     A. Yes, sir.

Q. Where did you have that lunch?

A. Well, I went to Temecula at six o'clock to telephone, and while I was there I bought lunch for all of us, and we sat right there in the machine, built a fire, and had our lunch.

Q. Manuel brought—

A. Brought the chinks to the barn, in the rear of

(Testimony of William Noel.)

the house, the farm-house, and after we got through all eating he took what was left back to the Chinamen.

Q. The Chinese were not with you there at the time you had your lunch?   A. No, sir. [102—64]

Q. Now, after you took the Chinese over to Third and Rose Streets on the first trip, you went back to the market, did you?   A. Yes, sir.

Q. And how long—was Lung there when you got there?   A. No.

Q. How long before he got back there?

A. Well, it must have been forty-five minutes, pretty near an hour. Mendoza came out, and he said he hadn't got back.

Q. Who came out and said he hadn't got back?

A. Martin.

Q. Did you go into the store with him?

A. Martin went back in the store; in about fifteen minutes I went in.

Q. Where were you sitting all this time?

A. We was sitting about fifty feet east of his store on the opposite side of the street.

Q. You could see everybody that went in and out?

A. Yes, sir.

Q. And had he gone in when you went in?

A. I didn't see him.

Q. Was he there when you got there?

A. Yes, sir.

Q. Now who else was present in that store?

A. There was three or four Chinamen working around there, in and out of the store, and his book-



(Testimony of William Noel.)

keeper, stenographer—I don't know who she was.

Q. Young lady?      A. Yes, sir.

Q. She was there at that time?      A. Yes, sir.

Q. Was she there when you made your first trip there.      A. Yes, sir.

Q. You saw her at that time, too?

A. The first trip?

Q. That is, I mean early in the morning before you went over to Rose Street.

A. I didn't see her; I wasn't in the store.

Q. You didn't see her when you first went there, and this all occurred on the first trip?

A. Yes, sir; all occurred on the first trip.

Mr. McKEEBY.—There are certain other questions I don't desire to go into at the present time on cross-examination with this witness—a line of examination I would prefer to go into after [103—65] adjournment. When I take it up, it will take some little time—if I do take it up.

(Whereupon court adjourned to Tuesday, 10:30 A. M.)

(Court convened on Tuesday, 10:30 A. M., November 26, 1911.)

(Defendants Lung and Daly in court with counsel.)

Mr. McKEEBY.—We will stipulate that the jury is present, your Honor.

The COURT.—Call the next witness, gentlemen.

Mr. REGAN.—I did not ask Mr. Noel with reference to his having entered a plea of guilty in this indictment No. 464. I will state from a personal

(Testimony of Martin Mendoza.)

examination of the records that it shows that Mr. Noel did enter his plea of guilty under this indictment No. 464.

Mr. McKEEBY.—We will stipulate on Mr. Regan's say-so that Mr. Noel did enter a plea of guilty in this particular indictment.

Mr. ANDREWS.—We will stipulate the same, your Honor, for the defendant Daly.

The COURT.—Very well.

Mr. REGAN.—Call Mr. Meyers.

Mr. McKEEBY.—There were one or two questions I wanted to ask Noel.

The COURT.—Very well.

Mr. REGAN.—Call Mr. Noel, then, for further cross-examination.

Mr. McKEEBY.—I would like first to call Mr. Mendoza for about two questions, your Honor.

The COURT.—Well, send word, then, so there will be no delay. Tell all three of these witnesses to come in. Their presence will not be material.

**[Testimony of Martin Mendoza, for Plaintiff  
(Recalled).]**

MARTIN MENDOZA recalled.

Cross-examination.

(By Mr. McKEEBY.)

Q. Mr. Mendoza, do you know this man here? Stand up, there. A. I don't think I do.

Q. Did you ever see him before? A. No, sir.

Mr. McKEEBY.—That is all.

(Testimony of William Noel.)

Mr. REGAN.—No questions.

The COURT.—Call the next witness.

(Witness excused.) [104—66]

**[Testimony of William Noel, for Plaintiff  
(Recalled).]**

WILLIAM NOEL recalled.

Cross-examination.

(By Mr. McKEEBY.)

Q. Mr. Noel, do you know—stand up, there—do you know that man? A. I cannot place him.

Q. Did you ever see him before?

A. I couldn't say whether I ever did or not.

Q. That you know of?

A. I can't say whether I ever seen him.

Mr. McKEEBY.—That is all.

The COURT.—Call the next witness.

Mr. McKEEBY.—That was all with him.

Q. Now, Mr. Noel, when you went down there to get the money on Sixth Street, you testified that you had already—you met Lung there?

Mr. REGAN.—Just fix the date, Mr. McKeeby.

Mr. McKEEBY.—Why, on the second trip—it was the 7th or 8th of December, I believe he has testified—

Mr. REGAN.—I am referring to the second trip when you went to 601 East Fourth—that was the 7th or 8th of December, was it?

A. Tuesday morning, of the 8th of December.

Q. Who was with you when Lung came along there in the car?

(Testimony of William Noel.)

A. Martin Mendoza and Manuel.

Q. Nobody else?      A. No, sir; myself.

Q. And Burgess was in with you at that time?

A. No, sir.

Q. I understood you to say the other day that Martin or Martin Mendoza had left you and that Burgess was there in the car with you.

Mr. REGAN.—That question is objected to as very uncertain and indefinite.

A. At what time?

Q. At the time they went back to get the money, about eleven o'clock on the morning of the 8th of December?

A. It was before we went back to get the money.

[105—67]

Q. It was before?

Mr. REGAN.—What was before?

A. That we seen Lung.

Q. (By Mr. McKEEBY.) What time in the morning was it that you saw Lung?

A. It must have been about eight or nine o'clock.

Q. You went up to Jeffries' place?      A. Yes, sir.

Q. Jeffries' saloon on Spring Street?

A. Yes, sir.

Q. Between Third and Fourth?      A. Yes, sir.

Q. On the east side of the street?      A. Yes, sir.

Q. And you there met Burgess?      A. Yes.

Q. He got into the car with you?

A. Not at that time, no, sir.

Q. When did he get into the car with you?

A. He got in the car about eleven o'clock.

(Testimony of William Noel.)

Q. And did you tell him where you were going?

A. Told *him was* going to San Diego.

Q. Did you go back to 601 East Fourth Street?

A. I went to Fourth and Central.

Q. To Fourth and Central, and Burgess went with you?     A. Yes, sir.

Q. Did you tell him what you were stopping there for?     A. No, sir; I did not.

Q. Did you ever tell him what you have done?

A. No, sir.

Q. Did you tell him what you came up from San Diego to do?     A. No, sir.

Q. Did you give him any of the money you collected?     A. No, sir.

Mr. McKEEBY.—That is all.

Mr. REGAN.—That is all.

The COURT.—Call your next witness.

(Witness excused.)

Mr. REGAN.—I think Mr. Noel and Mr. Mendoza had better remain in the courtroom for the purpose of identification only. Any time that you want them to retire, make your suggestion.

Mr. McKEEBY.—We would like possibly to recall Mr. Noel for [106—68] further cross-examination later on.

**[Testimony of Martin Mendoza, for Plaintiff (Recalled).]**

MARTIN MENDOZA recalled.

Direct Examination.

(By Mr. REGAN.)

Q. Mr. Mendoza, referring to the time when you



(Testimony of Martin Mendoza.)

made the first trip and delivered the Chinaman at Lung's house, do you remember the time I have reference to?    A. Yes, sir.

Q. That was in November, 1911?    A. Yes, sir.

Q. When you reached Lung's house who got out of the machine in reference to you and Noel?

A. I did.

Q. Noel stayed in the machine?    A. Yes.

Q. You *did* the Chinamen get out of the machine?

A. Why, I got—

Q. That is as to whether they took their time or they hurried?

A. Oh, they were in a hurry, of course.

Q. What did they do with reference to getting out?

A. Jumped right off and ran in the back end of the house.

Q. Had the machine stopped at the time they jumped out?

A. They wasn't to a quite full stop yet.

Mr. REGAN.—That is all.

Mr. REDD.—No questions.

(Witness excused.)    [107—69]

**[Testimony of James F. Meyers, for Plaintiff.]**

JAMES F. MEYERS, witness called on behalf of the United States, having been first duly sworn, testified as follows:

My name is James F. Meyers. I reside at 1045 W. 7th Street, in the City of Los Angeles, State of California. I am in the automobile business at 1212 S. Olive Street, in the City of Los Angeles. I re-

(Testimony of James F. Meyers.)

member seeing Mr. Noel and Mr. Mendoza on December 8th, 1911. They came to the garage where I was working and wanted some gasoline and oil which I sold them. There was a third man in the car at the time. The sale was made on December 8th, 1911. The car was all covered with dirt and grease and I made the remark, "You fellows must have been out in the country somewheres." They laughed and I think Noel said, "We have been out in the country"; that is all. They both appeared covered with dust like anybody would taking a long journey. One of them had a piece cut out of his shoe here (indicating). I suppose his foot must have been lame.

**[Testimony of Horace A. Walling for Plaintiff.]**

HORACE A. WALLING, witness called on behalf of the United States, having been first duly sworn testified as follows:

My name is Horace A. Walling. I reside in San Diego part of the time and part of the time in Los Angeles, California. I resided in San Diego in November and December, 1911, and at that time was engaged in the automobile business. I am acquainted with Martin Mendoza and Wm. Noel. I remember the occasion about November 28th, 1911, in which Noel hired an automobile from me at which time he made a trip and paid me the rent for the machine, which amounted to \$50.00 or \$75.00, I don't know which. He made two trips. I do not remember the exact length of time he had the machine on the first trip. It was figured out at the rate of \$4.00

(Testimony of Horace A. Walling.)

per hour. After the first trip, I had a conversation with Noel in reference to buying a car. Mr. Martin Mendoza was present [108—70] and they arranged to buy a car for the sum of \$1,500.00. They did not make any payment at that time but later paid me the sum of \$300.00 on the purchase price. On the night of December 7th or 8th I got a telephone message from Temecula that they had broken a wheel and for me to bring one out to them which I did and delivered it to them at Temecula, and then came back to San Diego. At the time I rented the car to Mr. Noel for the first trip a Mr. De Paul, whom I am well acquainted with, brought him to the garage and stood sponsor for the hire of the car on the first trip. Mr. Noel had been driving private cars there in San Diego as chauffeur for different people. I let him have a Schat car, which was the same one which he later contracted to purchase.

**[Testimony of Chas. Escallier, for Plaintiff.]**

CHAS. ESCALLIER, witness called on behalf of the United States, having been first duly sworn, testified as follows:

My name is Chas. Escallier and I reside at Temecula, State of California. I remember seeing Mr. Noel and Mr. Mendoza near Temecula in December, 1911. They were in an automobile about two miles beyond Temecula. I saw another Mexican and one sitting in an automobile and two others down below. The other two I spoke of were dressed as women. They sent me back to Temecula to have the garageman there come up. These two persons who were

(Testimony of Chas. Escallier.)

dressed as women were about thirty or forty yards from me when I saw them. I never was any closer than that and could not tell whether they were Mexicans or what nationality they were. This was about four o'clock in the afternoon.

**[Testimony of Fred H. Burgess, for Plaintiff.]**

FRED H. BURGESS, witness called on behalf of the United States, having been first duly sworn, testified as follows:

My name is Fred H. Burgess and I reside at 718 W. Third Street, in the City of Los Angeles, State of California. In December, 1911, I resided at 771 Mill Street, in said city. I am acquainted [109—71] with Wm. Noel and Martin Mendoza. Have known Martin Mendoza since about December 5th, 1911. I first met them at Jeffries' saloon, in the City of Los Angeles; that was in the morning; later I met them again about 11:30 at the same place and got in an automobile with them and went from Los Angeles to San Diego. Before leaving Los Angeles we drove around town and stopped at different places, went to Jeffries' saloon, also Harper and Reynolds' Hardware store, and to Hogue's arms store, where Noel and Mendoza each purchased a revolver. They then drove around and finally stopped at Fourth Street and Central Ave. Mendoza got out of the machine and went southwest and was gone for about a half or three-quarters of an hour. When he came back he got into the machine and we all proceeded to San Diego. I stayed all night with Noel and did not see Mendoza until the next day. (Witness shown re-



(Testimony of A. G. Barnard.)

volvers marked Exhibit 1 and 2, and he testified that they resembled the ones purchased at Hogue's arms store in the City of Los Angeles.)

**[Testimony of A. G. Barnard, for Plaintiff.]**

A. G. BARNARD, witness called on behalf of the United States, having been first duly sworn, testified as follows:

My name is A. G. Barnard. I reside at Bakersfield, Kern Co., California, and by occupation am Immigrant Inspector in the employment of the Government and was in such employ in December of last year. I am the official who arrested the defendant C. W. Lung, which arrest took place in San Diego, California, at about the hour of 8:10 of the morning of December 14th, 1911. (Witness shown two railroad tickets purchased from the Atchison, Topeka and Santa Fe Railroad Company for transportation from Los Angeles to San Diego and return offered in evidence by the Government and stipulated by the attorneys for respective parties that the same were purchased by the defendant C. W. Lung concerning which witness testified.) I took this ticket showing date of [110—72] purchase December 12, 1911, the validating stamp December 14, 1911, from the possession of the defendant C. W. Lung when I made the arrest. (The other ticket in evidence shows that it was purchased on December 5th, 1911, bearing validating stamp of December 7th, 1911, San Diego, California.)



**[Testimony of Gus P. Jones, for Plaintiff.]**

GUS P. JONES, witness called on behalf of the United States, having been first duly sworn, testified as follows:

My name is Gus P. Jones and I reside in the City of San Diego, State of California. By occupation I am a United States Immigrant Inspector and was such in December, 1911. I am acquainted with Martin Mendoza and Wm. Noel and was present on the occasion of their arrest on the 13th day of December, 1911; they were arrested at a place known as Point San Juan on the Coast road about halfway between Los Angeles and San Diego. On the occasion of their arrest they were going in the direction of Los Angeles. This occurred about the hour of 1:30 A. M., I should judge. Myself and Inspector Allison were together at the time. We were looking for these defendants Noel and Mendoza. We had been watching at that certain place for three nights. They had made one trip before this, which was about the 7th of the month or about a week before their arrest. I saw them on that trip going north towards Los Angeles, but was not looking for them on that occasion. I was at that time stationed at Elsinore and was called from Elsinore over to Fall Brook. On the night of their arrest about December 13, 1911, we were out watching for this outfit. I had the number of the car and their names and also a description of the car. About 1 or 1:30 I saw a light of a machine coming about three miles down the road. We camped on the beach and I placed a lantern in the

(Testimony of Gus P. Jones.)

middle of the road right at the top of the grade and wrapped a red bandana handkerchief around it. It was tolerable steep there so they slowed down with their machine. I [111—73] asked whose machine it was and Mr. Noel said it belonged to Mr. Walling in San Diego. I told him we were looking for that machine. In the machine we found the Chinaman and 12 cans of opium. The Chinaman was covered over with blankets and the opium piled in the tool-box. (Witness was shown Exhibit 3, constituting card with signature of T. J. Jones on the back thereof and testified as follows:) That is my signature. I put it there the day of the arrest in San Diego. I think the card was taken from Mr. Noel, but I am not sure. I put my name on it at the time. (Witness is shown Exhibit 1 and 2, constituting the revolvers introduced in evidence, and identified as the ones taken from Noel and Mendoza at the time of their arrest.)

**[Testimony of Mrs. Mary Gillman, for Plaintiff.]**

Mrs. MARY GILLMAN, a witness being called in behalf of the United States, after being first duly sworn, testified as follows:

It was stipulated by counsel that Chin Sing, mentioned in the last overt act in the indictment herein, was at all times mentioned in the said indictment a Chinese laborer and was tried before United States Commissioner H. T. Christian in the City of San Diego, County of San Diego, and was adjudged to be a Chinese laborer unlawfully within the country and ordered deported by reason thereof.

(Testimony of Mrs. Mary Gillman.)

Direct Examination.

(By Mr. REGAN.)

Q. What is your full name, Mrs. Gillman?

A. Mary Gillman.

Q. Where do you live?      A. 220 Rose Street.

Q. How long have you lived there, Mrs. Gillman?

A. Almost thirty-one years.

Q. Do you remember where Mr. Lung's house was in November and December of the year 1911?

A. Yes, sir.

Q. Was it near your house?      A. Yes, sir.

Q. How near was it?

A. Well, it was ten or fifteen feet distant. [112—74]

Q. Now, do you remember in the fall of 1911, an automobile coming into Mr. Lung's place?

A. Yes, sir; I do.

Q. Now, how long before Christmas was that?

A. Well, it was before Thanksgiving—before the holidays, as near as I can remember.

Q. Before the holiday season?      A. Yes, sir.

Q. Did you see this automobile come into Mr. Lung's place?      A. Yes, sir, I did.

Q. Did you see any men there in the automobile?

A. Yes, two men were in the automobile.

Q. What kind of looking men were they?

A. Well, they were both pretty stout men—heavy-set men, both of them.

Q. Were they what you would call Americans?

A. Well, one seemed to be light and the other was a dark one.

(Testimony of Mrs. Mary Gillman.)

Q. One of them looked like an American?

A. I think so.

Q. And when they came in there, you saw them in the automobile, did you—when they came into Lung's place?     A. Yes, sir.

Q. And then you went around to the other side of the house?

A. I was in at the window—I couldn't help seeing them. I was at the window and saw them come in with the automobile, and then I went back.

Q. Then you went around where you could get a better view?     A. Yes, sir.

Q. And when you next saw the automobile, it had just stopped?     A. Yes, sir.

Q. Now, what did you next see?

A. I saw one of these two men get out of the automobile.

Q. You saw one of these men get out of the machine?

A. Yes, sir; just jumped from the machine,—one of the men.

Q. And where did the other stay?

A. Why, he stayed on the seat, right on the front seat of the automobile. [113—75]

Cross-examination.

(By Mr. McKEEBY.)

Q. How long did you watch that machine, Mrs. Gillman?

A. Oh, I don't know,—about five minutes.

Q. Did you see the machine go away?

A. Yes, I saw it back up and go out.

(Testimony of Mrs. Mary Gillman.)

Q. And you saw it when it first stopped, did you?

A. Yes, sir.

Q. Did you see anyone get out of it besides this one man?     A. No, sir.

Q. You couldn't say how long they were there, could you?     A. No, sir.

Q. Who lives next door to Lung's?

A. Well, I couldn't see that from my house.

Q. Which side do you live on—the south side or the north side of Lung's?

A. On the north side of Lung's.

Q. Well, where does this Mr. J. W. Kees live?

A. Well, I live in between the two.

Q. You live between the two?     A. Yes, sir.

Q. Now, you own the house there?     A. Yes.

Q. You have rented to the Chinese there for a good many years, haven't you?

A. No, I don't own that house. I own the house where I am living in.

Q. You own the house where you are living?

A. Yes, sir.

Q. Well, the Chinese live there on both sides of you, and have been there for a great number of years, haven't they?     A. Yes, sir.

Q. Now, did you ever see any automobile go into Kee's yard?     A. Only his own.

Q. Now, was anyone else going there, do you know?

A. When they have parties visiting, that is all.

Q. That is all that you have ever seen—you have seen automobiles stop at Lung's house?



(Testimony of Mrs. Mary Gillman.)

A. Just once.

Q. Besides this time? A. No, only the one time.

Q. Well, now what kind of an automobile was that? A. It was a [114—76] big black one.

Q. And now, did you watch that from the time it went in there until it drove out again?

A. Well, I couldn't help but watch it—it was a strange thing to see an automobile go in there when no one was in the house hardly.

Q. And you watched the machine from the time it went in there until it drove away?

A. Well, I went back and I could see it from my porch, and I thought that probably—that maybe there was a bride in that automobile.

Q. Well, you watched it from the time it went in there until it left? A. Yes, sir.

Q. And you didn't see anyone get out except this one man, who was sitting on the front seat?

A. It wasn't the man who was sitting on the front seat that got out—he was the man who was sitting there.

Q. Well, you did see a man get out?

A. Yes, sir.

Q. And you only saw one man get out of the automobile? A. Yes, sir.

Q. And you saw the automobile back out and go away? A. I did.

Redirect Examination.

(By Mr. REGAN.)

Q. From the time you first saw the machine, where were you standing?

(Testimony of Mrs. Mary Gillman.)

A. Why, I was in my bedroom, at the window.

Q. Well, where did you go from there?

A. Well, I went to the shed.

Q. So you must have lost sight of the machine for a short time?     A. Yes, just while it drove in.

Q. You lost sight of it for a few minutes?

Q. (By Mr. McKEEBY.) You lost sight of the machine?

A. Well, I saw it drive in, and by the time I got back to the shed—

Q. But you did lose sight of the machine for a short time?     A. Yes, sir.

Q. When did you see it stop—did it have its back towards you, with the hood on?

A. Yes, sir. [115—77]

Q. Have the top up?     A. Yes, sir.

Q. You could see on both sides of it?

A. Yes, sir; I could see if anyone got out.

Q. You could have seen anyone get out of the machine?     A. Yes, sir.

Q. You saw the machine stop?

A. Yes, sir; it was stopped by the time I got down to the shed.

Q. You could see everything around there?

A. Yes, there was only one man got out of the machine.

Q. You could have seen them if there had been anyone else get out of the machine?

A. Well, I was there, and of course I didn't see anyone else, but just the one man get out of the machine.

(Testimony of Mrs. Mary Gillman.)

Q. (By Mr. REGAN.) You got there just as the machine stopped? A. Yes, sir.

Q. You don't know whether anyone got out before it stopped or not?

A. Well, they would have to get out before it stopped.

Q. But you don't know whether they did or not?

A. I don't know.

Q. You lost sight of the machine?

A. Well, they would have to jump out while the machine was driving around, if they got out.

Q. You could see from your window?

A. Yes, sir, and then I went back to the shed.

Q. (By Mr. McKEEBY.) How long, Mrs. Gillman, from the time you first saw the machine until you saw it the second time?

A. Well, not more than five minutes, hardly.

Q. Five minutes?

A. Yes, sir; I didn't give it such very close account.

Q. And you went right straight from your bedroom window right back? A. Yes, sir.

Q. How far from your bedroom window there is it back to the shed? A. Oh, maybe ten feet.

Q. Well, then for about ten feet you were out of sight of the machine—while the machine was going about ten feet? A. Yes. [116—78]

Q. (By Mr. REGAN.) Could you see into the back door?

A. No, I could see only part of the back porch—not to the door—not when I stood there—I couldn't

(Testimony of Mrs. Mary Gillman.)

see only to the back porch.

Q. You couldn't see into the door?

A. No, I couldn't see into the doorway.

(Witness excused.)

Mr. REGAN.—That is the Government's case.

Mr. McKEEBY.—I would like to introduce these witnesses out of order; most of them are very busy men in the market.

The COURT.—Very well.

Mr. McKEEBY.—I will call Mrs. Smith.

**[Testimony of C. W. Lung, for Defendant.]**

C. W. LUNG, called as a witness on behalf of himself as defendant, testified on cross-examination.

Page 21 of my cash-book shows that on November 27, 1911, I was charged with having drawn \$350.00. I may have drawn it—I can't remember—I think I did. I do not know what it was for.

The foregoing is a statement of all the proof made and evidence adduced on the part of the Government and the proceedings had upon the hearing and trial of this action before me, Frank R. Rudkin, sitting as Judge in the United States District Court of the Southern District, Southern Division of California, on the trial of said action before said Court and a jury, said defendant C. W. Lung and his said counsel being present at all the proceedings herein mentioned.

The defendant, C. W. Lung, within the time allowed by law, files this as his Bill of Exceptions, and asks that same be settled and allowed.

Dated this April 8th, 1913.

McKEEBY & REDD,  
Attorneys for Defendant. [117—79]

The foregoing Bill of Exceptions is correct and may be settled and allowed.

Dated this April 10th, 1913.

A. I. McCORMICK,  
United States District Attorney.

EDWARD A. REGAN,  
Assistant United States District Attorney.

**Order [Settling and Allowing Bill of Exceptions].**

The foregoing Bill of Exceptions is correct and is hereby settled and allowed.

Dated this April 16th, 1913.

FRANK R. RUDKIN,  
Judge.

[Endorsed]: Original. No. 464—Crim. In the United States District Court in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. C. W. Lung, Martin Mendoza, Manuel Mendoza, L. W. Noel, Me Hong, Joaquin Nand and Arthur Daly, Defendants. Bill of Exceptions. Filed Apr. 19, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within ..... this .... day of ....., 19... .., Attorneys for ..... McKeeby & Redd, Suite 616 California Building. Telephones: Main 2389, Home F 1596, Los Angeles, Cal., Attorneys for C. W. Lung. [118—80]



**[Order Extending Time to File Bill of Exceptions  
and Fixing Bail Pending Appeal.]**

At a stated term, to wit, the January Term, A. D. 1913, of the District Court of the United States of America in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, California, on Wednesday, the 15th day of January, in the year of our Lord, one thousand nine hundred and thirteen. Present: Honorable OLIN WELLBORN, District Judge.

No. 464—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

C. W. LUNG et al.,

Defendants.

Edward A. Regan, Esq., Assistant U. S. Attorney, appearing as counsel for the Government, George L. McKeeby, Esq., appearing as counsel for defendant C. W. Lung; now, on motion of counsel for defendant C. W. Lung, it is ordered that the time of said defendant C. W. Lung within which he may file a bill of exceptions, and also the stay of exceptions heretofore granted said defendant Lung, be, and they hereby are extended from January 18th, 1913, to January 28th, 1913, and it is further ordered that the bail of said defendant Lung, pending appeal, be, and the same hereby is fixed at \$2,500.00. [119]

**[Bond to Appear.]**

United States of America,  
Southern District of California,—ss.

BE IT REMEMBERED, that on this 22d day of January, in the year of our Lord one thousand nine hundred and thirteen, before me, E. H. Owen, a Commissioner duly appointed by the District Court of the United States for the Southern District of California, to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the courts of the United States, pursuant to the acts of Congress, in that behalf, personally appeared C. W. Lung, as principal, and Geo. L. McKeeby, and Cora E. Colby, as sureties, and jointly and severally acknowledged themselves to be indebted to the United States of America, in the sum of twenty-five hundred (\$2,500) Dollars, separately to be levied and made out of their respective goods and chattels, lands and tenements, to the use of the said United States.

The condition of the above recognizance is such, that, whereas, an indictment has been found by the Grand Jury of the United States for the Southern District of California, and filed on the 8th day of March, A. D. 1912, in the District Court of the United States, for said Southern District of California, charging the said C. W. Lung with the violation of Sec. 37 of Federal Penal Code of 1910 (conspiracy to smuggle Chinese laborers into the United States), committed on or about the first day of October, A. D.

1911, to wit, at the District aforesaid, contrary to the form of the statute of the United States, in such case made and provided;

AND WHEREAS, the said C. W. Lung was in said court on the 27th day of November, A. D. 1912, by the jury selected and sworn to try the said cause, duly found guilty of said offense and whereas the Judge of said Court, on the 13th day of December, 1912, upon the said indictment and said verdict of said [120] jury finding the said C. W. Lung guilty of the said offense as charged in said indictment, did in open court, in the presence and hearing of said C. W. Lung and his counsel, duly pronounce and render sentence in a judgment against the said C. W. Lung that he be imprisoned and confined in the United States Penitentiary at McNeil Island, State of Washington, for a term of one (1) year and one (1) day, and whereas the said C. W. Lung has been required to give recognizance with sureties in the sum of Twenty-five hundred (\$2500) Dollars for his appearance,

Now, Therefore, if the said C. W. Lung, shall personally appear at the District Court of the United States for the Southern District of California, to be holden at the courtroom of said Court, in the City of Los Angeles, whenever or wherever he may be required to answer the said indictment and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises and not depart the said Court without leave first obtained, and having now been convicted

and judgment having been rendered against him as above shall render himself to the United States Marshal for the Southern District of California, before the expiration of the period of time embraced in any stay of execution granted or that may be granted in said cause or any extension thereof in execution of said judgment, then this recognizance shall be void, otherwise to remain in full effect and virtue.

C. W. LUNG. [Seal]

GEO. L. McKEEBY. [Seal]

CORA E. COLBY. [Seal]

Acknowledged before me the day and year first above written.

[Seal]

E. H. OWEN,

United States Commissioner, Southern District of California.

Southern District of California,—ss.

Geo. L. McKeeby and Cora E. Colby, being duly sworn, each for himself deposes and says that he is [121] a householder in said District, and is worth the sum of Twenty-five Hundred Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

GEO. L. McKEEBY.

CORA E. COLBY.

Subscribed and sworn to before me, this 22d day of January, A. D. 1913.

[Seal]

E. H. OWEN,

United States Commissioner.

The form of the foregoing Bond and the sufficiency

of the sureties thereto is hereby approved.

E. H. OWEN,  
U. S. Commissioner.

[Endorsed]: No. 464—Crim. United States District Court, Southern District of California. The United States of America vs. C. W. Lung. Bond to Appear. On Appeal to Circuit Court of Appeals. In the sum of \$2500.00. With Geo. L. McKeeby and Cora E. Colby as Sureties. Filed Jan. 22, 1913, at . . . . min. past . . . . o'clock . . . . M. Wm. M. Van Dyke, Clerk. By E. H. Owen, Deputy. [122]

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*In the District Court of the United States of America, in and for the Southern District of California, Southern Division.*

Case No. 464—CRIM.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

C. W. LUNG et al.,

Defendants.

**Petition for Writ of Error.**

Comes now C. W. Lung, one of the defendants herein, and says: That on or about the 27th day of November, 1912, a jury in the above-entitled court found this defendant guilty as charged in the above-entitled action, and in the trial of said case and the proceedings had thereunto certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assign-



ment of Errors which is filed with this petition.

WHEREFORE, this defendant prays that a Writ of Error may issue in his behalf to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a transcript of the record proceedings and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals.

McKEEBY & REDD,  
Attorneys for Defendant.

[Endorsed]: Original. No. 464—Crim. In the United States District Court in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. C. W. Lung et al. Defendant. Petition for Writ of Error. Filed January 28, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Received copy of the within ..... this .... day of ....., 191... .., Attorneys for ..... McKeeby & Redd, Suite 616 California Building. Telephones: Main 2389, Home F 1596, Los Angeles, Cal., Attorneys for Defendant. [123]

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*In the District Court of the United States, Southern  
District of California, Southern Division.*

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

C. W. LUNG et al.,  
Defendants.

**Assignment of Errors.**

The defendant, C. W. Lung, in connection with his petition for a writ of errors makes the following assignment of errors which he avers occurred upon the trial of this cause; to wit:

**I.**

The Court erred in admitting the evidence of the alleged co-conspirator Martin Mendoza over the objection of the attorneys for the defendant.

(a) The conspiracy not having been proven by competent evidence.

(b) No competent evidence other than the evidence of the said alleged co-conspirators having been offered to prove the connection of the defendant, C. W. Lung, with said alleged conspiracy.

(c) No concert of action having been shown between the several defendants, charged, and C. W. Lung.

(d) It being a narrative of past events after a consummation of the alleged conspiracy made by an alleged co-conspirator.

**II.**

The Court erred in denying the motion of defendant, C. W. Lung, to strike out all of the testimony of said witness Martin Mendoza for the same reason set forth in the first assignment of error herein and for the further reason:

(a) That said testimony was not connected by competent evidence.

(b) That no conspiracy was proven by competent evidence. [124]

(c) That the connection of the defendant, C. W. Lung, with said alleged conspiracy was not proven by competent evidence.

### III.

The Court erred in refusing to grant defendant's motion for instruction to the jury to acquit the defendant, C. W. Lung.

(a) No competent evidence having been introduced to prove the alleged conspiracy.

(b) No competent evidence having been introduced to prove the connection of defendant, C. W. Lung, to the alleged conspiracy.

(c) No concert of action having been shown between the several defendants charged and C. W. Lung.

(d) Insufficient evidence to sustain a verdict.

### IV.

The Court erred in admitting the evidence of the alleged co-conspirator, Wm. Noel, over the objection of the attorneys for the defendant.

(a) The conspiracy not having been proven by competent evidence.

(b) No competent evidence other than the evidence of the said alleged co-conspirators having been offered to prove the connection of the defendant, C. W. Lung, with said alleged conspiracy.

(c) No concert of action having been shown between the several defendants and C. W. Lung.

(d) It being a narrative of past events after a consummation of the alleged conspiracy made by an alleged co-conspirator.

V.

The Court erred in denying the motion of defendant, C. W. Lung, to strike out all of the testimony of said witness, Wm. Noel, for the same reason set forth in the first assignment of error herein and for the further reason:

(a) That said testimony was not connected by competent evidence. [125]

(b) That no conspiracy was proven by competent evidence.

(c) That the connection of the defendant, C. W. Lung, with said alleged conspiracy was not proven by competent evidence.

VI.

The Court erred in admitting the testimony of the witness James F. Meyers over the objection of the defendant, C. W. Lung.

(a) No competent evidence having been introduced to show the connection of defendant Lung with the alleged conspiracy.

(b) Not a part of any overt act.

(c) Irrelevant, incompetent and immaterial.

VII.

The Court erred in admitting the testimony of the witness Horace A. Walling over the objection of the defendant, C. W. Lung.

(a) No competent evidence having been introduced to show the connection of defendant Lung with the alleged conspiracy.

(b) Not a part of any overt act.

(c) Irrelevant, incompetent and immaterial.

## VIII.

The Court erred in admitting the testimony of the witness Chas. S. Escallier over the objection of the defendant, C. W. Lung.

(a) No competent evidence having been introduced to show the connection of defendant Lung with the alleged conspiracy.

(b) Not a part of any overt act.

(c) Irrelevant, incompetent and immaterial.

## IX.

The Court erred in admitting the testimony of the witness Fred H. Burgess over the objection of the defendant, C. W. Lung.

(a) No competent evidence having been introduced to show [126] the connection of defendant Lung with the alleged conspiracy.

(b) Not a part of any *over* act.

(c) Irrelevant, incompetent and immaterial.

## X.

The Court erred in admitting the testimony of the witness G. Bernard over the objection of the defendant, C. W. Lung.

(a) No competent evidence having been introduced to show the connection of defendant Lung with the alleged conspiracy.

(b) Not a part of any overt act.

(c) Irrelevant, incompetent and immaterial.

## XI.

The Court erred in admitting the testimony of the witness Emile Christopher over the objection of the defendant, C. W. Lung.

(a) No competent evidence having been intro-



duced to show the connection of defendant Lung with the alleged conspiracy.

(b) Not a part of any overt act.

(c) Irrelevant, incompetent and immaterial.

## XII.

The Court erred in admitting the testimony of the witness, Gus P. Jones, over the objection of the defendant, C. W. Lung.

(a) No competent evidence having been introduced to show the connection of defendant Lung with the alleged conspiracy.

(b) Not a part of any overt act.

(c) Irrelevant, incompetent and immaterial.

## XIII.

The Court erred in admitting the testimony of the witness Mary Elida Hamlin, over the objection of the defendant, C. W. Lung.

(a) No competent evidence having been introduced to show [127] the connection of defendant Lung with the alleged conspiracy.

(b) Not a part of any overt act.

(c) Irrelevant, incompetent and immaterial.

## XIV.

The Court erred in admitting the testimony of the witness Mrs. Mary Gillman, over the objection of the defendant, C. W. Lung.

(a) No competent evidence having been introduced to show the connection of defendant Lung with the alleged conspiracy.

(b) Not a part of any overt act.

(c) Irrelevant, incompetent and immaterial.

## XV.

The Court erred in admitting the testimony of the witness Mr. Miller, over the objection of the defendant, C. W. Lung.

(a) No competent evidence having been introduced to show the connection of defendant Lung with the alleged conspiracy.

(b) Not a part of any overt act.

(c) Irrelevant, incompetent and immaterial.

## XVI.

The Court erred in admitting the testimony of the witness Cassius L. Keep, over the objection of the defendant, C. W. Lung.

(a) No competent evidence having been introduced to show the connection of defendant Lung with the alleged conspiracy.

(b) Not a part of any overt act.

(c) Irrelevant, incompetent and immaterial.

## XVII.

The Court erred in not granting defendant's motion to strike out the testimony of the witness James F. Meyers.

(a) No competent testimony having been introduced to prove the connection of said C. W. Lung with the alleged conspiracy.

(b) Not a part of the overt act.

(c) Incompetent, irrelevant and immaterial.

(d) No connection shown between defendant C. W. Lung and [128] *and* witnesses Martin Mendoza and Wm. Noel who are also charged as defendants.

XVIII.

The Court erred in not granting defendant's motion to strike out the testimony of the witness Horace A. Walling.

(a) No competent testimony having been introduced to prove the connection of said C. W. Lung with the alleged conspiracy.

(b) Not a part of the overt act.

(c) Incompetent, irrelevant and immaterial.

(d) No connection shown between defendant C. W. Lung and witnesses Martin Mendoza and Wm. Noel who are also charged as defendants.

XIX.

The Court erred in not granting defendant's motion to strike out the testimony of the witness Chas. S. Escallier.

(a) No competent testimony having been introduced to prove the connection of said C. W. Lung with the alleged conspiracy.

(b) Not a part of the overt act.

(c) Incompetent, irrelevant and immaterial.

(d) No connection shown between defendant C. W. Lung and witnesses Martin Mendoza and Wm. Noel who are also charged as defendants.

XX.

The Court erred in not granting defendant's motion to strike out the testimony of the witness Fred H. Burgess.

(a) No competent testimony having been introduced to prove the connection of said C. W. Lung with the alleged conspiracy.

(b) Not a part of the overt act.

(c) Incompetent, irrelevant and immaterial.

(d) No connection shown between defendant C. W. Lung and witnesses Martin Mendoza and Wm. Noel who are also charged as defendants. [129]

### XXI.

The Court erred in not granting defendant's motion to strike out the testimony of the witness G. Bernard.

(a) No competent testimony having been introduced to prove the connection of said C. W. Lung with the alleged conspiracy.

(b) Not a part of the overt act.

(c) Incompetent, irrelevant and immaterial.

(d) No connection shown between defendant C. W. Lung and witnesses Martin Mendoza and Wm. Noel, who are also charged as defendants.

### XXII.

The Court erred in not granting defendant's motion to strike out the testimony of the witness Emile Christopher.

(a) No competent testimony having been introduced to prove the connection of said C. W. Lung with the alleged conspiracy.

(b) Not a part of the overt act.

(c) Incompetent, irrelevant and immaterial.

(d) No connection shown between defendant C. W. Lung and witnesses Martin Mendoza and Wm. Noel who are also charged as defendants.

### XXIII.

The Court erred in not granting defendant's motion to strike out the testimony of the witness Gus P. Jones.

(a) No competent testimony having been introduced to prove the connection of said C. W. Lung with the alleged conspiracy.

(b) Not a part of the overt act.

(c) Incompetent, irrelevant and immaterial.

(d) No connection shown between defendant C. W. Lung and witnesses Martin Mendoza and Wm. Noel who are also charged as defendants.

#### XXIV.

The Court erred in not granting defendant's motion to [130] strike out the testimony of the witness Mary Elida Hamlin.

(a) No competent testimony having been introduced to prove the connection of said C. W. Lung with the alleged conspiracy.

(b) Not a part of the overt act.

(c) Incompetent, irrelevant and immaterial.

(d) No connection shown between defendant C. W. Lung and witnesses Martin Mendoza and Wm. Noel who are also charged as defendants.

#### XXV.

The Court erred in not granting defendant's motion to strike out the testimony of the witness Mrs. Mary Gillman.

(a) No competent testimony having been introduced to prove the connection of said C. W. Lung with the alleged conspiracy.

(b) Not a part of the overt act.

(c) Incompetent, irrelevant and immaterial.

(d) No connection shown between defendant C. W. Lung and *witness* Martin Mendoza and Wm. Noel who are also charged as defendants.



## XXVI.

The Court erred in not granting defendant's motion to strike out the testimony of the witness Mr. Miller.

(a) No competent testimony having been introduced to prove the connection of said C. W. Lung with the alleged conspiracy.

(b) Not a part of the overt act.

(c) Incompetent, irrelevant and immaterial.

(d) No connection shown between defendant C. W. Lung and witnesses Martin Mendoza and Wm. Noel who are also charged as defendants.

## XXVII.

The Court erred in not granting defendant's motion to strike out the testimony of the witness Cassius L. Keep.

(a) No competent testimony having been introduced to prove the connection of said C. W. Lung with the alleged conspiracy. [131]

(b) Not a part of the overt act.

(c) Incompetent, irrelevant and immaterial.

(d) No connection shown between defendant C. W. Lung and witnesses Martin Mendoza and Wm. Noel who are also charged as defendants.

## XXVIII.

The Court erred in denying defendant's motion for new trial.

(a) Court erred in decision of questions of law arising during the course of the trial.

(b) The verdict is contrary to law.

(c) The verdict is contrary to the evidence.

(d) The verdict is contrary to law and the evidence.

(e) The evidence is insufficient to justify the verdict.

McKEEBY & REDD,  
Attorneys for Defendant, C. W. Lung.

[Endorsed]: Original. No. 464—Crim. In the United States District Court in and for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. C. W. Lung et al., Defendants. Assignment of Errors. Filed January 28, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Received copy of the within this 28 day of Jan., 1913. A. I. McCormick, Edward A. Regan, Attorneys for Pltff. McKeeby & Redd, Suite 616 California Building. Telephones: Main 2389, Home F 1596, Los Angeles, Cal., Attorneys for Defendant. [132]

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**Praecipe [for Transcript of Record.]**  
**UNITED STATES OF AMERICA.**

*District Court of the United States, Southern District of California, Southern Division.*

Clerk's Office.

No. 464—CRIM.

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

C. W. LUNG, MARTIN MENDOZA, MANUEL MENDOZA, ME HONG, JOAQUIN NAND, and ARTHUR DALY,

To the Clerk of said Court:

Sir: Please issue a certified copy of the record in the above-entitled case, upon the Writ of Error sued out by defendant C. W. Lung, said record consisting of the Indictment, Bench Warrant, Demurrer of Defendant C. W. Lung, Motion of Defendant C. W. Lung to Quash Indictment, Order of Court Denying Motion to Quash and Overruling Demurrer, Entry of Plea of Defendant C. W. Lung, Minutes of the Trial, Verdict, Motion for New Trial, Motion in Arrest of Judgment, Order of Court Denying Motion in Arrest of Judgment and Motion for New Trial, Judgment and Sentence, Bill of Exceptions, Order Fixing Bail of Said Defendant Lung Pending Appeal, Bond to Appear, Petition for Writ of Error, Assignment of Errors, and this Praecipe, said record to be annexed to the Writ of Error and the Citation, and to be certified under the hand of the Clerk and the Seal of the Court.

McKEEBY & REDD,

Attorneys for Defendant C. W. Lung. [133]

[Endorsed]: No. 464—Crim. U. S. District Court, Southern District of California, Southern Division. United States of America, Plaintiff, vs. C. W. Lung, Martin Mendoza, Manuel Mendoza, Me Hong, Joaquin Nand and Arthur Daly, Defendants. Praecipe for copy of Record. Filed Jul. 17, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [134]

**[Certificate of Clerk U. S. District Court to Transcript of Record.]**

*In the District Court of the United States of America, in and for the Southern District of California, Southern Division.*

No. 464—CRIM.

THE UNITED STATES OF AMERICA,  
Plaintiffs,

vs.

C. W. LUNG, MARTIN MENDOZA, MANUEL  
MENDOZA, L. W. NOEL, ME HONG,  
JOAQUIN NAND, and ARTHUR DALY,  
Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing one hundred and thirty-four typewritten pages, numbered from 1 to 134, inclusive, and comprised in one volume, to be a full, true and correct copy of the Indictment, Bench Warrant, Demurrer of Defendant C. W. Lung to the Indictment, Motion of Defendant C. W. Lung to Quash Indictment, Order of Court Denying Motion to Quash and Overruling Demurrer, Entry of Plea of Defendant C. W. Lung, Minutes of the Court upon the Trial of said Defendant C. W. Lung, Verdict, Motion for New Trial, Motion in Arrest of Judgment, Order of Court Denying Motion in Arrest of Judgment and Motion for New Trial, Judgment and Sentence, Bill of Exceptions, Order Fixing Bail of said Defendant Lung

Pending Appeal, Bond to Appear, Petition for Writ of Error, Assignment of Errors and Praecipe for Record in the above-entitled cause, and that the same, together, constitute the record in said cause upon the Writ of Error to the United States District Court for the Southern District of California, Southern Division, sued out by said Defendant C. W. Lung, as specified in the Praecipe filed in my office on behalf of the said defendant by his attorneys of record.

[135]

I do further certify that the cost of the foregoing record is \$74.40, the amount whereof has been paid me on behalf of said Defendant C. W. Lung by Messrs. McKeeby & Redd, his attorneys.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America in and for the Southern District of California, Southern Division, this 19th day of July, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States, the one hundred and thirty-eighth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States in  
and for the Southern District of California.

[136]

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[Endorsed]: No. 2312. United States Circuit Court of Appeals for the Ninth Circuit. C. W. Lung, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District



Court of the Southern District of California, Southern Division.

Received August 28, 1913.

F. D. MONCKTON,  
Clerk.

Filed August 29, 1913.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

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**[Order Enlarging Time to March 31, 1913, to File  
Record in Appellate Court.]**

*In the United States Circuit Court of Appeals, Ninth  
Judicial Circuit.*

C. W. LUNG et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendants in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiffs in error to docket said cause and file the record thereof with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 31st day of March, 1913.

Dated at Los Angeles, February 20th, 1913.

OLIN WELLBORN,  
United States District Judge, for the Southern District of California.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. C. W. Lung et al., Plaintiffs in Error, vs. The United States of America, Defendants in Error. Order Extending Time to File Record. Filed Feb. 24, 1913. F. D. Monckton, Clerk.

**[Order Enlarging Time to June 1, 1913, to File  
Record in Appellate Court.]**

*In the United States Circuit Court of Appeals, Ninth  
Judicial Circuit.*

C. W. LUNG et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendants in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiffs in error to docket said cause and file the record thereof with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 1st day of June, 1913.

Dated at Los Angeles, March 27th, 1913.

OLIN WELLBORN,  
United States District Judge, for the Southern District of California.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. C. W. Lung et al., Plaintiffs in Error, vs. The United States of America, Defendants in Error. Order Extending Time to File Record. Filed Mar. 29, 1913. F. D. Monckton, Clerk.

**[Order Enlarging Time to August 1, 1913, to File  
Record in Appellate Court.]**

*In the United States Circuit Court of Appeals, Ninth  
Judicial Circuit.*

C. W. LUNG et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendants in Error.

Good cause appearing therefor, it is hereby ordered that the time heretofore allowed said plaintiffs in error to docket said cause and file the record thereof with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby enlarged and extended to and including the 1st day of August, 1913.

Dated at Los Angeles, May 31st, 1913.

OLIN WELLBORN,

United States District Judge.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to August 1, 1913, to File Record Thereof and to Docket Case. Filed Jun. 3, 1913. F. D. Monckton, Clerk.

**[Order Enlarging Time to September 1, 1913, to File  
Record in Appellate Court.]**

*In the United States Circuit Court of Appeals, Ninth  
Judicial Circuit.*

C. W. LUNG et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendants in Error.

Good cause appearing therefor, it is hereby ordered that the time heretofore allowed said plaintiffs in error to docket said cause and file the record thereof with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby enlarged and extended to and including the 1st day of September, 1913.

Dated at Los Angeles, July 24, 1913.

OLIN WELLBORN,

United States District Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. C. W. Lung et al., Plaintiffs in Error, vs. The United States of America, Defendant in Error. Order Extending Time to File Record. Filed Jul. 26, 1913.

No. 2312. United States Circuit Court of Appeals for the Ninth Circuit. Four Orders Under Rule 16 Enlarging Time to September 1, 1913 to File Record thereof and to Docket Case. Re-filed Aug. 29, 1913. F. D. Monckton, Clerk.

10

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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<b>C. W. Lung,</b>		<i>Plaintiff in Error,</i>
		<i>vs.</i>
<b>United States of America,</b>		<i>Defendant in Error.</i>

## BRIEF OF PLAINTIFF IN ERROR.

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### STATEMENT OF THE CASE.

On the 8th day of March, 1912, the United States grand jury for the Southern District of California, Southern Division, returned a true bill of indictment against C. W. Lung [Tr. pages 6 to 10 inc.], Manuel Mendoza, Martin Mendoza, L. W. Noel, Me Hong, Joaquin Nand and Arthur Daly, for a violation of Sec. 37, Federal Penal Code, 1910, (conspiracy to smuggle Chinese laborers), and on said true bill of indictment a bench warrant [Tr. page 11] was issued, directed to the marshal of the United States for the Southern District of California, and his deputies, and either of them, commanding them to apprehend and bring before the court at the United States District Court room, in the city and county of Los Angeles, the said defendants.



Thereafter, defendant Lung was duly arraigned before said District Court, and gave his true name as C. W. Lung.

Thereafter, on the 1st day of April, 1912, said C. W. Lung served upon the United States attorney for the Southern District of California his demurrer to said indictment and motion to quash said indictment. [Tr. pages 17 to 18, inc.]

Thereafter, on Nov. 22nd, 1912, said cause was called for trial before the Hon. Frank R. Rudkin, and said trial was continued from day to day to and including the 27th day of November, 1912, when the jury returned its verdict of "guilty" against the said defendant, C. W. Lung. [Tr. pages 18 to 32, inc.]

Thereafter, on the 9th day of December, 1912, defendant served upon the United States attorney for the Southern District of California his motion for a new trial, and motion in arrest of judgment. [Tr. pages 33 to 35, inc.]

Thereafter, on the 13th day of December, 1912, both the motion in arrest of judgment and for a new trial were denied by the Hon. Frank R. Rudkin, district judge, and thereupon said judge proceeded to sentence C. W. Lung to be imprisoned in the United States penitentiary at McNeil Island, state of Washington, for the term of one year and one day. [Tr. pages 36 to 37, inc.]

Thereafter, on the 28th day of January, 1913, said defendant C. W. Lung sued out his writ of error [Tr. pages 1, 2 and 3, inc.] to this Honorable Court, and citation was thereupon issued. [Tr. pages 4 and 5, inc.]

Thereafter, on the 28th day of January, 1913, said defendant, C. W. Lung, served and filed his assignment of errors.

Thereafter, on the 16th day of April, Hon. Frank R. Rudkin allowed the bill of exceptions [Tr. pages 38 to 138, inc.] of plaintiff in error, C. W. Lung.

## **BRIEF.**

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### **ARGUMENT, POINTS AND AUTHORITIES.**

The defendant C. W. Lung assigns twenty-eight main errors committed by the court in the trial of said case, and in each of the twenty-eight assignments of error there are from three to four particular assignments set out in sub-headings.

The first three assignments of error cover the testimony of the co-conspirators, Martin Mendoza and Wm. Noel, and are as follows:

#### **I.**

The court erred in admitting the evidence of the alleged co-conspirator, Martin Mendoza, over the objection of the attorneys for the defendant.

a. The conspiracy not having been proven by competent evidence.

b. No competent evidence other than that of the alleged co-conspirators having been offered to prove the connection of the defendant, C. W. Lung, with the alleged conspiracy.

c. No concert of action having been shown between the several defendants charged, and C. W. Lung.

d. It being a narrative of past events, after the commission of the alleged conspiracy, made by an alleged co-conspirator.

## II.

The court erred in denying the motion of defendant, C. W. Lung, to strike out all of the testimony of said witnesses Martin Mendoza and Wm. Noel, for the same reason set forth in the first assignment of error, and for the further reason:

a. That said testimony was not connected by competent evidence.

b. That no conspiracy was proven by competent evidence.

c. That the connection of the defendant, C. W. Lung, with said alleged conspiracy was not proven by competent evidence.

## III.

The court erred in refusing to grant defendant's motion to instruct the jury to acquit the defendant, C. W. Lung.

a. No competent evidence having been introduced to prove the connection of defendant, C. W. Lung, to the alleged conspiracy.

b. No competent evidence having been introduced to prove the alleged conspiracy.

c. No concert of action having been shown between the several defendants charged and C. W. Lung.

d. Insufficient evidence to sustain the verdict.

These assignments of error apply to the testimony of witnesses Martin Mendoza and Wm. Noel.

Defendant then sets forth ten assignments of error covering the admission of the testimony of the following named witnesses [Tr. page 60]: James F. Meyers, Horace Walling, Chas. Escallier, Frank Burgess, G. Bernard, Emile Christopher, Gus Jones, Mary Elida Hamlin, Mrs. Mary Gillman, Mr. Muller and Casius L. Keep, and one example will cover these ten assignments, as follows:

“The court erred in admitting the testimony of the witness Jas. F. Meyers, over the objection of the defendant, C. W. Lung.

a. No competent evidence having been introduced to show the connection of defendant, C. W. Lung, with the alleged conspiracy.

b. Not a part of any overt act.

c. Irrelevant, incompetent and immaterial.”

Defendant then sets up ten assignments of error for the same witnesses upon the court's refusal to grant defendant's motion to strike out their testimony, and one example will cover all of these ten assignments of error, as follows:

“The court erred in not granting defendant's motion to strike out the testimony of witness Jas. F. Meyers.

a. No competent evidence having been introduced to prove the connection of said C. W. Lung with the alleged conspiracy.

b. Not a part of any overt act.

c. Incompetent, irrelevant and immaterial.

d. No connection shown by the defendant C. W. Lung and witnesses Martin Mendoza and Wm. Noel, who are also charged as defendants.”

Before proceeding to a citation of points and authorities we desire to call the court's attention particularly to the fact that the transcript contains ALL of the proof made and evidence adduced on the part of the government. [Tr. page 137.]

A careful reading of the evidence of all of the witnesses produced on the part of the government will show that there is not a single witness, with the exception of Martin Mendoza and Wm. Noel, who in any way connected the defendant C. W. Lung with these two men.

It will also be noted in the Tr., page 41, that the witness Martin Mendoza plead "guilty" to this same indictment, as did also witness Wm. Noel, therefore they are the alleged co-conspirators with plaintiff in error, C. W. Lung.

The testimony of all of the other witnesses for the United States does not, with the possible exception of the testimony of Mrs. Mary Gillman, whose testimony appears in full [Tr. pages 131 to 137, inc.], in any manner connect the defendant C. W. Lung with the witnesses Martin Mendoza and Wm. Noel, but simply corroborates Noel and Mendoza in their statements of *their* overt act.

The testimony of Mrs. Gillman is simply to the effect that at one time she saw an automobile with two men in it, whom she could not identify, at Lung's home, and in her testimony she absolutely fails to corroborate either Noel or Mendoza in any particular whatever. In fact, where they testify that they took a number of



Chinese to Lung's house in an automobile, she says but one man got out of the machine, and that he immediately got back in the machine and drove away in it. She could have seen and would have seen any others get out of the machine, if they had been there.

The testimony of James F. Meyers is absolutely immaterial in this action and is no part of any overt act, and further, is a narrative of past events. The same may be said of the testimony of Horace Walling, Chas. Escallier and Fred Burgess.

The testimony of witness Gus P. Jones is to the effect that he arrested, in company with others, the two conspirators Noel and Mendoza, but he does not in any manner connect the plaintiff in error with either or both of them.

It is therefore our contention that the testimony of all of these witnesses is incompetent, irrelevant and immaterial, as it fails to connect plaintiff in error with the co-conspirators, Noel and Mendoza. As was said in the case of the United States v. Richards, 149 Fed. Rep. 443, page 452, "To establish the connection of any one of the defendants with the conspiracy, such connection must be shown by facts and circumstances, or by his own acts, conduct or declarations, independent of the declarations of others, and until this fact is established he is not bound by the declarations and statements of others." The principle of law and the rule of evidence is that when once a conspiracy or combination is established and the defendant's connection therewith is established by independent evidence, then he is bound by the acts and statements of his co-conspirators.

And again, the rule is, as set forth in the Sixth American & English Encyclopedia of Law, page 868, "And until the conspiracy is shown, *aliunde*, the acts and declarations of the alleged conspirator are inadmissible to establish the connection with the conspiracy of one charged as a co-conspirator." As was well said by Dyer, J., in *United States v. Goldberg*, 7 Bliss (U. S.) 175, "If a conspiracy be shown to exist, the next question is whether or not the defendants on trial, or either of them, were connected with that conspiracy as parties thereto. To establish this connection it must be shown by facts or circumstances independent of the declarations of others, or by his own acts, conduct or declarations, and until this fact is thus established he is not bound by the declarations or statements of others. The principle of law and rule of evidence is, that when once the conspiracy is established, *and the defendant's connection therewith is shown by independent evidence* (italics ours), then he is bound by the acts and declarations and statements of his co-conspirators, because in that case each is deemed to assent to or commend what is done in furtherance of the one object."

Sec. 1111 of the Penal Code of California provides: "A conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of an accomplice, tends to connect the defendant with the commission of the offense, and the corroboration is insufficient if it merely shows the commission of the offense or the circumstances thereof." This is the law in the state of California and has been since the Crim-

inal Practice Act of 1851. Kerr's Penal Code of California, Sec. 1111.

This court in passing upon this matter in the case of the United States v. Wong Din, 135 Fed. Rep. 702, in which case the plaintiff in error, Wong Din, relied upon the case of the United States v. Logan, 45 Fed. 873, to support the contention that we make in this case, viz., that a conviction for conspiracy cannot be had on the uncorroborated testimony of the co-conspirators, nor can conspirators corroborate each other. The case relied upon as above, United States v. Logan, was afterwards taken to the United States Supreme Court, where it was reversed, Judge Gray writing the opinion of the court, 144 United States 263, 36 L. E. 429.

In the case at bar it will be seen by a careful reading of the testimony introduced on behalf of the government that there was absolutely no evidence whatever connecting the plaintiff in error, C. W. Lung, with the conspiracy, or the commission of any overt act except the uncorroborated testimony of the acknowledged conspirators Mendoza and Noel. All of the other testimony which the government depends upon as corroborative of their testimony is simply a narrative of past events, and the Supreme Court has said in this connection: "Tested by this rule, it is quite clear that the defendant on trial could not be affected by the admissions made by others of the alleged conspirators, after the conspiracy had ended, by the attack on the prisoners, the killing of two of them, and the dispersing of the mob. There is no evidence in the record tending

to show that the conspiracy continued after that time. Even if, as suggested by the counsel for the United States, the conspiracy included an attempt to manufacture evidence to shield Logan, Johnson's subsequent declarations that Logan acted with the mob at the fight at Dry Creek, were not in execution or furtherance of the conspiracy, but were mere narratives of past fact, and statements to the same effect made by Charles Marlow to his companions while returning to the Denson farm, after the fight was over, were incompetent in any view of the case."

"There being other evidence tending to prove the conspiracy and any acts of Logan in furtherance of the conspiracy being therefore admissible against all of the conspirators as their acts. The admission of incompetent evidence of such acts of Logan prejudiced all of the defendants and entitled them to a new trial."

It is so in the case at bar. The admission of testimony of Meyers, Walling, Escallier, Burgess, Bernard, Jones, Gillman, was all in the nature of past events, was incompetent, as it did not either tend to connect the plaintiff in error with the conspiracy or with any overt act and its admission before the jury and the court's refusal after its admission to strike it from the record, and instruct the jury to disregard the same, was absolutely prejudicial to the plaintiff in error, C. W. Lung, in that the jury were allowed to consider this testimony, and in view of the caution given by the court as to the testimony of an accomplice, to consider this immaterial testimony, this narrative of past events, was corroborative of the testimony of the two acknowledged conspirators, Noel and Mendoza, and in view of the strong

language of Mr. Justice Gray in the case of *Logan v. The United States*, *supra*, it is our contention that the error of the trial court in admitting this evidence was so prejudicial that the judgment should be reversed and the cause remanded with instructions in accordance with the opinion.

The authority for the admission of the testimony of an accomplice and co-conspirator dates back to the sixteenth century. Along toward the end of the seventeenth century the courts began to act upon the modern conception as to admitting a witness and yet discriminating as to the qualitative sufficiency of his testimony became more apparent, but not until the end of that century, the seventeenth, did the courts begin acting upon such a suggestion in their instructions to the jury, and about that time came a general practice to discourage a conviction founded solely upon the testimony of an accomplice, uncorroborated. It was recognized that the judge's instructions upon this point were a mere exercise of his common law function of advising the jury upon the weight of evidence, and was not a statement of a rule of law binding upon the jury. As a matter of common law the doctrine was universally understood as amounting to no rule of evidence, but merely a counsel of caution given by the judge to the jury, but in half of the jurisdictions in this country this cautionary practice has been turned into a rule of law. The judge must therefore, under these statutes, instruct the jury in the rule of law, and the jury must follow. This rule of law has been in force in the state courts of our own jurisdiction since the Criminal Practice Act of 1851, Sec. 1111, of the Penal Code of California, and



is in our opinion one of the wisest and safest precautions adopted by our law-makers to protect the rights of our people, and in our judgment no case that ever came before the court could more clearly justify the reason for this statute than the case at bar. Here is a man standing facing a term in the penitentiary, a citizen of the United States (for this Chinaman is native born, and has been so adjudged), who, if he is compelled upon the testimony of self-confessed violators of our laws, to serve a term in the penitentiary, will be deprived of that thing which is more dear to the American citizen than any other one thing within the gift of this great republic, his right as a citizen, the right of franchise.

Without this wise provision in the statutes, any two or more self-confessed criminals can enter into a conspiracy to convict not only the lowly, but the highest and most honorable citizen of the United States of a crime charged under Sec. 37 of the Penal Code of the United States, and where the court permits evidence to be introduced, as in this case, which merely corroborates the conspirators as to their own acts, and as to that only, as a narrative of past events, it is clear that the remarks here made are capable of being *consummated* upon any of our witnesses. For instance, suppose, for the sake of argument, that these two men, self-confessed criminals, Noel and Mendoza, had desired to charge the witness Walling with being a member of the conspiracy, and in their testimony had connected him as they did the plaintiff in error, and the evidence had been admitted with the so-called corroboration that was admitted in this case, there is no ques-

tion but what the same jury would have returned the same verdict against Walling as they did against the plaintiff in error. It may be contended on behalf of the government that Lung, when he took the witness stand in his own behalf, could not explain what he did with the \$350, or whether he even took \$350, on November 27th, 1911, and that this is sufficient corroboration of the testimony of Noel and Mendoza to uphold the verdict of the jury in this case. Our reply to that is that all defendants are presumed to be innocent until proven guilty beyond all reasonable doubt and to a moral certainty. That at the close of the prosecution's case, if there is no evidence sufficient to compel a defendant to introduce evidence in his own behalf, no case having been made out against him by competent evidence, that he is entitled to an instruction by the court to the jury that no competent case had been made out against him, and therefore they should acquit him. [Tr. pages 44 to 93, inc.]

In the case of *Wong Din v. The United States*, 135 U. S. 702, decided by this court Feb. 20, 1905, case No. 1097, Judge Hawley, in writing of the opinion of the court says: "The testimony of Thomas Burnett, ii competent, and believed by the jury to be true, was sufficient to justify the verdict of 'guilty' found by the jury," and in that connection he quotes from the opinion of Judge Nixon, in the case of *The United States v. Sacia*, 2 Fed. 754, 758, as follows:

"The fact that a witness is a co-conspirator doubtless operates, and ought to operate, largely against the credibility of his testimony, but the jury is not bound to

reject it on that account. Whilst it would be unsafe in ordinary cases to convict anyone on the uncorroborated testimony of accomplices in the crime, the rule of law is that they are competent witnesses, and it is your duty to consider their evidence. You are to weigh it and scrutinize it with great care. You are to test its truth by inquiring into the probable motive which prompted it. You are to look into the testimony of other witnesses for corroborating facts. Where it is supported in material respects you are bound to credit it, but where it is unsupported you are not to rely upon it unless, after the exercise of extreme caution, it produces in your minds the most positive conviction of truth."

In the case of Wong Din if the court will take the trouble to look up the record they will find that there was evidence in abundance by disinterested witnesses connecting the defendant Wong Din with the defendant, Thomas T. Burnett, and therefore in that case the charge of Judge Nixon above quoted, the verdict of "guilty" as to Wong Din, upon the testimony of said Thomas Burnett, was amply sufficient, but in the case at bar there is absolutely no evidence for the jury to have looked into. As said by Judge Nixon, "You are to look into the testimony of other witnesses for a corroboration of the facts," and where the testimony of the conspirators Noel and Mendoza was unsupported, the jury must have been satisfied as to the most positive conviction of the truth of their story. Can it be said in all reason that had the court excluded the evidence of witnesses other than Noel and Mendoza, that the

jury, knowing, as they did, the history and record of these two conspirators, could have had the positive conviction of the truth of their story? We contend not. Was there any competent evidence that they could have looked into for corroboration of the testimony of these two, under the decision of the United States Supreme Court, in the case of *The United States v. Logan?* (*supra*). We say no. Therefore we contend that the evidence in the case at bar is wholly insufficient to sustain the verdict of “guilty.”

It was held in the case of *Logan* against the United States (*supra*):

“That the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty has no application to criminal trials.”

If the Supreme Court had not so held, there is absolutely no question but what the plaintiff in error, in the case at bar, would have been discharged.

Penal Code of California, Sec. 1111;

*People v. English*, 52 California, 212;

61 California, 137;

77 California, 506;

*People v. Loven*, 119 California, 91.

In other words, if Sec. 858 Revised Statutes had been construed by the Supreme Court of the United States to apply to criminal trials, Sec. 1111 of the Penal Code of California would have applied to the case at bar, and there being no evidence other than the evidence of the

confessed co-conspirators to connect the plaintiff in error, C. W. Lung, with the alleged conspiracy, there could have been no conviction. Unfortunately, however, the Supreme Court, as above quoted, has decided that Sec. 858, R. S., does not apply to criminal trials. Therefore the statutes of the state of California do not apply to the case at bar. Nevertheless, we still contend that the law-makers of this state, one of whom was the Hon. Stephen Field, associate justice of the Supreme Court of the United States, were more than wise in their day and generation when they incorporated in the organic law of the state of California, in the Criminal Practice Act of 1851, the provision that a defendant could not be convicted on the uncorroborated testimony of an accomplice or a co-conspirator, and their successors were equally wise when the same law was re-enacted and continued in Sec. 1111, Penal Code, of the State of California, and we contend that the rule of evidence in this circuit should be in accordance with the section above quoted, and in all cases where the defendant is not connected with the conspiracy, by evidence *aliunde*, the testimony of the co-conspirators should be thrown out and that no conviction should be had upon the uncorroborated testimony of a co-conspirator or an accomplice, and that the corroboration should be such that it must tend to connect the defendant with the commission of the offense, and is not sufficient if it merely shows the commission of the offense, or the circumstances thereof.



Bradford, district judge, in charging the jury in the case of *The United States v. Giuliani*, 147 Fed. 594, says at page 598:

"I may further add that if the testimony of Rosa Caliendo and Pasquale Frallicciardi stands wholly uncorroborated, directly or circumstantially, this court would deem it its duty to advise the jury not to convict the defendant upon their uncorroborated testimony \* \* \* but unquestionably there is evidence in this case tending to corroborate the truthfulness of their testimony before you, and the weight of that corroborative evidence is for you, as reasonable men, and not for the court to determine."

It is so in the case at bar. If there was any testimony to corroborate the testimony of the conspirators Mendoza and Noel, then it was a matter for the jury to determine, whether their testimony was true or false. If true, and it was not excluded by reason of another rule of evidence, then the defendant, plaintiff in error here, might have been found "guilty," and the verdict permitted to stand. If untrue, to the extent of a positive conviction, then the defendant, plaintiff in error here, is entitled to a verdict of acquittal.

The testimony of the alleged conspirators Noel and Mendoza was inadmissible for the reason that it was a narrative of past events.

It will be noted from a careful reading of the transcript in this case that the testimony of the conspirators, Noel and Mendoza, was simply nothing more or less than a narrative of past events which had transpired

long before it was given and after the conspiracy had been ended.

Their testimony, therefore, was clearly inadmissible, as has been said by the Supreme Court of the United States:

“If a conspiracy has come to an end, either by success or by failure, the admissions of one conspirator by way of narrative of past facts are not admissible in evidence against the others.”

Brown v. United States, 150 U. S. 93 (37 L. E. 1011);

Logan v. United States, 144 U. S. 310 (36 L. E. 430);

Brown v. United States, 159 U. S. 100 (40 L. E. 90);

Brown v. United States, 164 U. S. 221 (41 L. E. 410),

It is therefore our contention that in the case at bar the verdict of the jury should be set aside and the defendant, plaintiff in error here, given a new trial.

## I.

The court erred in admitting evidence of the alleged co-conspirators over the objection of the attorneys for the defendant, also the conspiracy not having been proven by competent evidence.

a. No competent evidence other than the evidence of said alleged co-conspirator having been offered to prove the connection of the defendant, plaintiff in error here, C. W. Lung, with the said alleged conspiracy.

b. No concert of action having been shown between the several defendants charged and said C. W. Lung.

c. Being a narrative of past events after the commission of the alleged conspiracy, made by an alleged co-conspirator.

## II.

The court erred in denying the motion of defendant, plaintiff in error here, C. W. Lung, to strike out all of the testimony of said witness, Martin Mendoza, for the same reason set forth in the first assignment of error herein, and for the further reason:

a. That said testimony was not connected by competent evidence.

b. That no conspiracy was proven by competent evidence.

c. That the connection of the defendant, plaintiff in error here, C. W. Lung, with said alleged conspiracy was not proven by competent evidence.

## III.

The court erred in refusing to grant defendant's motion for an instruction to the jury to acquit the defendant.

a. No competent evidence having been introduced to prove the alleged conspiracy.

b. No competent evidence having been introduced to prove the connection of the defendant, plaintiff in error here, C. W. Lung, with the alleged conspiracy.

c. No concert of action having been shown between the several defendants charged and C. W. Lung.

d. Insufficient evidence to sustain a verdict.

IV.

The court erred in admitting the evidence of the alleged co-conspirator, William Noel, over the objection of the attorneys for the defendant, for the same reasons and in the same particulars that it erred in admitting the evidence of the witness Martin Mendoza.

V.

The court erred in denying the motion of defendant to strike out all of the testimony of said witness, Wm. Noel, for the same reasons and in the same particulars that it refused to strike out all of the testimony of the witness Martin Mendoza.

VI.

The court erred in admitting the testimony of the witnesses James F. Meyers, Horace A. Walling, Charles S. Escallier, Fred H. Burgess, G. Bernard, Emile Christopher, Gus P. Jones, Mary Elida Hamlin, Mrs. Mary Gillman, Mr. Miller and Casius L. Keep, for the following reasons:

- a. No competent evidence having been introduced to show the connection of defendant Lung to the alleged conspiracy.
- b. Not a part of any overt act.
- c. Irrelevant, incompetent and immaterial.

VII.

The court erred in not granting defendant's motion to strike out the testimony of witnesses Fred H. Burgess, G. Bernard, Emile Christopher, Gus P. Jones,

Mary Elida Hamlin, Mrs. Mary Gillman, Mr. Miller and Casius L. Keep, for the following reasons:

a. No competent testimony having been introduced to prove the connection of said C. W. Lung to the alleged conspiracy.

b. Not a part of any overt act.

c. Irrelevant, incompetent and immaterial.

d. No connection shown between defendant C. W. Lung and witnesses Martin Mendoza and William Noel, who are also charged as defendants.

For the foregoing reasons we respectfully submit that the verdict of the jury in the case at bar should be set aside, and the case reversed, with instructions in accordance with the decision of this court.

Respectfully submitted,

McKEEBY & REDD,

*Attorneys for Plaintiff in Error.*





United States  
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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C. W. Lung,	}
<i>Plaintiff in Error,</i>	
<i>vs.</i>	
United States of America,	}
<i>Defendant in Error.</i>	

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BRIEF OF DEFENDANT IN ERROR.

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STATEMENT.

Plaintiff in error, C. W. Lung, appeals from a conviction for violation of Section 37, Penal Code of 1910, that is, a conspiracy to smuggle Chinese laborers into the United States. The Government's testimony consists in that of two co-conspirators or accomplices, viz., Mendoza and Noel, corroborated, as we contend, in many important particulars by the witnesses, viz., Myers [Tr. p. 124]; Walling [Tr. p. 125]; Escallier [Tr. p. 126]; Burgess [Tr. p. 127]; Barnard [Tr. p. 128]; Jones [Tr. p. 129]; and Gillman [Tr. p. 130]; and, as we contend, by the testimony of Lung himself [Tr. p. 137].

Mendoza and Noel describe three journeys to the Mexican boundary, bringing by the first journey two Chinese, who were delivered in Los Angeles to defendant Lung, who paid Mendoza \$300.00 for his services, \$10.00 of which was paid on delivery and \$290.00 later in the day, the agreed price which Lung was to pay Mendoza and Noel being \$150.00 for each Chinaman; bringing the second journey three Chinamen from the Mexican boundary, who were also delivered to the defendant Lung at Los Angeles, for which Mendoza or Noel or one of them was paid \$450.00 by defendant Lung; and a third attempt to bring to the defendant Lung one Chinaman and some opium.

The co-conspirators, Mendoza and Noel, very clearly testified to the foregoing facts among many other details, each telling the same story. Their testimony is corroborated in nearly every important particular, which is hereinafter pointed out.

The questions presented by this appeal of defendant, Lung, are principally embodied in the contention of Lung's counsel, to-wit, that the testimony of Mendoza and Noel was not corroborated and that a conviction cannot be sustained in the Federal court on the testimony of accomplices unless the same is corroborated.

There are two or three other minor contentions which will be hereinafter referred to, viz., the action of the court in permitting the statements of said accomplices before a conspiracy had been established, which we contend went to the order of the proof and not to its competency, and, next, to the action of the court in permitting what appears to be certain statements made by third parties to the co-conspirators, Mendoza and

Noel, while they were participating in the conspiracy, to which Lung is shown to be a party.

The contention of the Government is that in the Federal courts a conviction may be sustained upon the uncorroborated testimony of an accomplice or accomplices; and second, that in the case at bar the testimony of the two co-conspirators, Mendoza and Noel, was sufficiently corroborated, and in the next place that no error was committed by the court in exercising his discretion as to the order of proof and in the admission of evidence on the trial of this case.

Therefore, we submit this case on the following propositions:

**Points, Authorities and Argument of Defendant in Error.**

PROPOSITION NO. I.

The order of proof in a conspiracy case is in the discretion of the court.

Of this proposition we think there can be no doubt, for in Vol. 8 *Cyc.*, p. 682, in discussing this question, it is said:

“According to the great weight of authority the order in which the testimony shall be received is largely in the discretion of the trial court. If the circumstances of the case are so peculiar and urgent as to require it, the acts and declarations of a conspirator may be introduced in the first instance before proof of the crime.”

Drake v. Stewart, 76 Fed. Rep. 140.

PROPOSITION No. 2.

The court committed no error in allowing evidence of the acts and declarations of persons not parties to the record, for the reason that the same were admissible against the defendant where it appeared that they were made in carrying the conspiracy into effect or attempting to carry it into effect.

Clune v. U. S., 159 U. S. 590.

The case of *Clune v. U. S.*, *supra*, sufficiently answers the contention of counsel as made on pages 9 and 10 of his brief, wherein he contends that the testimony of certain witnesses was incompetent.

PROPOSITION No. 3.

A conviction may be sustained in the Federal courts on the uncorroborated testimony of an accomplice or accomplices.

Little need be said in reply to the argument of counsel for plaintiff in error set out on pages 10 *et seq.* of their brief, for the reason that Section 1111 of the Penal Code of California is cited and discussed and which is not applicable to this case. It is thoroughly settled that the provision of Section 858 of the Revised Statutes of the United States, that the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the court of the United States in trials at common law and in equity and admiralty, has no application to criminal trials in the Federal courts.

In *Logan v. The United States*, 144 U. S. 300, 36 Law. Ed., p. 442, the history of Section 858 of the Re-



vised Statutes is discussed and it is clearly held that rules of evidence in criminal trials in the Federal courts are not covered by the statutes of the several states.

As far as we are able to find, it has always been the rule in the Federal courts for the court to charge the jury that they should receive the testimony of an accomplice with great caution and should not act upon it unless after the exercise of extreme caution it produces in their minds the most positive conviction of its truth.

This rule, of course, originated in the seventeenth century, and, as stated by Mr. Wigmore in Vol. 3, Sec. 2056 *et seq.*, of his work on Evidence, grew out of, or originated in the right of the courts administering the common law to charge upon the evidence.

As stated in the foregoing section:

“As a matter of common law, then, the doctrine was universally understood (except by one or two courts) as amounting to no rule of evidence, but merely to a counsel of caution given by the judge to the jury. It followed that the jury might or might not regard the caution by acquitting upon an uncorroborated accomplice’s testimony; that they alone were to determine whether corroboration existed and was sufficient; and that the trial judge’s omission of the caution was of itself not a ground for a new trial, being a matter solely for the trial judge’s discretion.”

In about half of our states or jurisdictions it appears that a statute has expressly changed this cautionary practice into a rule of law, but we have been unable to find any decision of the Federal courts which requires the testimony of an accomplice or accomplices to be corroborated in order to sustain a conviction. Below are found a number of cases sustaining this position.

FEDERAL CASES.

- U. S. v. Babcock, 3 Dill. 571;  
U. S. v. Troax, 3 McLean 224;  
U. S. v. Kessler, Baldw. 15-22;  
Steinham v. U. S., 2 Paine 168-180; 22 Fed.  
Cases No. 13355;  
U. S. v. McKee, 26 Fed. Cases No. 15,685;  
Same Case, 26 Fed. Cases No. 15,686;  
U. S. v. Sacia, 2 Fed. Rep. 754;  
U. S. v. Fleming, 18 Fed. Rep. 907;  
U. S. v. Lancaster *et al.*, 44 Fed. Rep. 896;  
U. S. v. Sykes, 58 Fed. Rep. 1004;  
Crawford v. U. S., 212 U. S. 203-4-5;  
U. S. v. Giuliani, 147 Fed. Rep. 598;  
Richardson v. U. S., 181 Fed. Rep. 9;  
Holmgren v. U. S., 217 U. S. 509; 54 L. Ed.  
867-8.

STATE CASES.

- Flanagen v. State, 25 Ark. 92;  
Solander v. People, 2 Colo. 48;  
Wisdom v. People (Colo.), 17 Pac. 519;  
State v. Wolcott, 21 Conn. 272;  
Gray v. People, 26 Ill. 344;  
Cross v. People, 47 Ill. 152 (In this case it was  
said: "It is a matter of discretion with the  
court to advise rather than a rule of law");  
Craft v. State, 3 Kan. 450;  
State v. Patterson, 52 Kan. 335;  
State v. Prudhomme, 25 La. 522 (In this case  
it is said: "It is rather a practice than a rule  
of law");

State v. Russell, 33 La. 135 (In this case it is said: "The authorities justify conviction by the jury on such testimony although it may not be corroborated by other");

State v. Vickman, 52 La. 1921; 28 So. 273 (This case approves the foregoing Louisiana cases and holds that in a requested charge that the accomplice's testimony should not be even considered unless corroborated, was held properly refused);

State v. Cunningham, 31 Me. 355;

State v. Litchfield, 58 Me. 267;

Com. v. Bosworth, 22 Pick. 397;

Com. v. Larrabee, 99 Mass. 413;

Com. v. Elliott, 110 Mass. 104;

Com. v. Scott, 123 Mass. 222;

Com. v. Wilson, 152 Mass. 12; 25 N. E. 16;

Hamilton v. People, 29 Mich. 173;

Keithler v. State, 10 Sm. & M. 192 (In this case it was held that the jury may believe the accomplice if they choose, without corroboration);

Dick v. State, 30 Miss. 593;

State v. Watson, 31 Mo. 361 (The opinion in this case is denominated by Mr. Wigmore in his work on Evidence as a good opinion);

State v. Walker, 98 Mo. 95; 11 S. W. 1133;

State v. Harkins, 100 Mo. 666; 13 S. W. 830;

State v. Marcks, 140 Mo. 656; 41 S. W. 973;

State v. Tobie, 141 Mo. 547; 42 S. W. 1078;

Lamb v. State, 40 Neb. 312; 58 N. W. 963;

State v. Hyer, 39 N. J. L. 598;

State v. Rachman, 68 N. J. 120; 53 Atl. 1046;  
Lindsay v. People, 63 N. Y. 145 (At this point  
the law of New York was changed by a statute of 1882);

State v. Holland, 83 N. C. 624;

Allen v. State, 10 Oh. St. 287;

Kelrow v. Com., 125 Pa. 94;

State v. Green, 48 S. C. 136; 26 S. E. 234;

State v. Potter, 42 Vt. 495-506 (In this case it  
is stated that it is only a rule of practice, and  
not a rule of law);

Edwards v. State, 2 Wash. 291; 26 Pac. 258;

State v. Betslall, 11 W. Va. 703;

State v. Hill, 48 W. Va. 132; 35 S. E. 831;

Mercer v. Wright, 3 Wis. 645 (In this case it  
is held that a jury ought not to convict on  
the testimony of an accomplice unless corroborated, but all now agree that they may do so);

Porath v. State, 90 Wis. 527; 63 N. W. 1061.

In the case of *U. S. v. Sacia, supra*, the rule seems to be thoroughly recognized that a conviction could be sustained on the uncorroborated testimony of an accomplice, and there the charge of the court was in part as follows:

“Where there is support in material respects you are bound to credit it, but where it is unsupported you are not to rely upon it unless after the exercise of extreme caution it produces in your mind the most positive conviction of its truth.”

In the case of *Steinham v. U. S., supra*, it was held that an accomplice being a competent witness it was

not erroneous for a court to direct a jury to find a verdict upon his uncorroborated evidence if they believed him. There is a very lengthy note following this decision set out in 22 Fed. Cases, pages 1236-7-8, thoroughly discussing the history of the rule.

In the case of *U. S. v. McKee*, 26 Fed. Cases No. 15,685, and also 26 Fed. Cases No. 15,686, Justice Dillon very thoroughly discusses the weight due in the law to the testimony of confessed conspirators and accomplices and the rules of law laid down in respect to the power of juries to convict on such testimony when not corroborated. In this opinion it is said, at 26 Fed. Cases, p. 1111:

“The testimony of conspirators is always to be received with extreme caution and weighed and scrutinized with great care by the jury, who should not convict upon it unsupported unless it produces in their minds the surest and most positive conviction of its truth. It is just and proper in such cases for the jury to seek for corroborating facts in material respects. It is just and proper to do it. It is not absolutely necessary.”

In the case of *U. S. v. Giuliani, supra*, at page 598, it is said:

“While the testimony of an accomplice should always be received with caution, and weighed and scrutinized with great care by the jury, the accomplice is nevertheless a competent witness, and the degree of credit which should be given to the testimony of an accomplice is a matter exclusively within the province of the jury. While the jury, as a matter of law, may convict a person accused of a grave crime upon the uncorroborated testimony of an accomplice, it is, however, usual for the court to advise the jury against the conviction un-



less the testimony of the accomplice has been corroborated by competent evidence in some material part.”

In the case of *Richardson v. U. S.*, *supra*, at page 9, it is said:

“There is nothing which forbids the conviction of defendant, at common law, or in a Federal court, on the uncorroborated testimony of an accomplice. No doubt there is a well established practice, sanctioned by long practice and judicial approbation, to caution jurors about accepting the evidence of an accomplice without material corroboration, coming, as it does, from a polluted source, but this is as far as the matter goes, and corroboration not being indispensable, an instruction that the jury ought to acquit where there is none, encroaches on the prerogatives of the jury, who have a right to rely on such evidence if they are satisfied with it, and the court may therefore without error refuse to charge that they ought not.”

It will be seen that the court in those instances only gave the instruction as a caution to the jury and allowed them to find a verdict of guilty provided the testimony of the accomplice produced in their minds the most positive conviction of its truth.

In the case of *U. S. v. Lancaster et al.*, *supra*, it was held that an accomplice, notwithstanding the turpitude of his conduct, is not on that account an incompetent witness, but the jury may, if they please, act on the evidence of an accomplice.

In the case of *Crawford v. U. S.*, 212 U. S. 204, Justice Peckham, in referring to the testimony of an accomplice, states that the evidence of such a witness

ought to be received with suspicion and with the very greatest care and caution and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses. This opinion seems to recognize that a conviction may be sustained on the evidence of an accomplice, uncorroborated, but that the jury should be warned that the testimony of an accomplice or accomplices should be received with great caution.

It appears in the case at bar counsel objected to the testimony of the accomplices on the ground that they had either plead guilty or been convicted of the same offense as the defendant Lung [Tr. p. 42; also Tr. p. 93]; counsel's position was at the time that the witnesses Mendoza and Noel were incompetent witnesses, but it is a well settled rule of law that a co-conspirator, though an accomplice and though uncorroborated, is always a competent witness. The fact that he is an accomplice operates not against the admissibility of his testimony, but only against its credibility.

Vol. 8 Cyc., p. 684.

In Section 2056 of Vol. 3 of Wigmore on Evidence, at page 2747, it is said:

"At common law the judge was entitled and bound to assist the jury before their retirement with an expression of his opinion (in no way binding them to follow it) upon the weight of the evidence. This utterance was made the medium of many useful general suggestions based on experience. The benefit of this experience was thus obtained for them, without any attempt to fetter their judgment by inflexible dogmas unfitted for invariable application as rules of law. One of these

general hints was that about accomplices' testimony. But in this country the orthodox function of the judge to assist the jury on matters of fact was in a misguided moment (except in a few jurisdictions) eradicated from our system. The judge was forbidden to contribute to the jury's aid any expression of opinion on the weight of evidence in a given case. Unless there was a rule of the law of evidence on the subject of an accomplice's testimony, he could not in a given case advise them to refuse to convict upon the uncorroborated testimony of an accomplice. The makers of this innovation upon established trial methods were thus obliged to turn into a rule of law the old practice as to accomplices, if they wished to retain its benefit at all."

So it will be seen that it is only in the state courts where the state has passed a statute requiring the testimony of an accomplice to be corroborated that it is necessary for an accomplice's testimony to be corroborated to sustain a conviction.

#### PROPOSITION No. 4.

The evidence of the accomplices or co-conspirators Mendoza and Noel was amply corroborated in this case.

The testimony of Myers [Tr. pp. 124, 125] was that he was in the automobile business in Los Angeles, and that he remembered seeing Noel and Mendoza on December 8, 1911, where they came to his garage to secure some gasoline and oil, which the witness sold them; but there was a third man in the car at the time, and that the car was all covered with dirt and grease, and that both Mendoza and Noel appeared to be covered with dust, and that one of them had a piece cut out of his shoe and that he supposed this one was lame. It

will be noted that this corroborates the testimony of Mendoza and Noel as to that trip to the border and the delivery of the Chinese to defendant Lung.

Also, the testimony of Walling [Tr. pp. 125, 126], which shows that he was engaged in the automobile business and that he was acquainted with Mendoza and Noel, and that Noel hired an automobile from him and made a trip and paid the rent, amounting to \$50.00 or \$75.00; that he made two trips with the automobile; that the witness had a conversation with Noel about buying a car and that Mendoza was present and that they arranged to buy a car for \$1500.00 and later bought one and paid down the sum of \$300.00, and that on the night of December 7th or 8th, the witness received a telephone message from Temecula stating that Mendoza and Noel had broken a wheel and that the witness carried a new wheel to Mendoza and Noel at Temecula.

This corroborates the testimony of Mendoza and Noel as to having broken a wheel on one of the trips after Chinamen and of applying to this witness and getting a new wheel for the car.

Also the testimony of witness Escallier [Tr. pp. 126, 127]. This witness testifies to having seen Mendoza and Noel near Temecula in December, 1911, when they were in an automobile about two miles from Temecula; that he saw people with Mendoza and Noel and two of them were dressed as women, which corroborates the statement of the accomplices to the effect that the Chinese were dressed as women when they were brought up to Los Angeles.



Also, the testimony of Burgess [Tr. pp. 127, 128]. This witness testifies that Mendoza and Noel purchased the two revolvers (exhibits offered in evidence) at Hoegee's store.

Also, the testimony of Barnard [Tr. p. 128]. This witness arrested C. W. Lung in San Diego on the morning of December 11, 1911, and the witness identified two railroad tickets purchased from the Santa Fe Railway from Los Angeles to San Diego and return, these tickets being purchased on December 5th, 1911, the date that the accomplices said the defendant Lung went to San Diego.

Also, the testimony of Jones [Tr. pp. 129, 130]. This witness testified that when he arrested Mendoza and Noel at the Point San Juan on the coast road between Los Angeles and San Diego, they were going in the direction of Los Angeles, and that Noel made the statement that the car belonged to Mr. Walling in San Diego, and that in the machine the officers found one Chinaman and twelve cans of opium. It will be noted this was the third trip, by which Mendoza and Noel testified they were to bring one Chinaman for the defendant Lung.

Also, the testimony of Mrs. Gillman [Tr. pp. 131, 132, 133, 134, 135, 136, 137]. By the testimony of this witness it was shown that she saw an automobile come to Mr. Lung's place in the fall of 1911 before Thanksgiving, and that there were two men in the automobile and that they were both pretty stout, heavy-set men, both of them, and that they went to the defendant Lung's house or place and that the automobile stopped at Lung's place and that one of the men got out of the



automobile and that the other one stayed in the automobile on the seat.

Now it will be noted that each of these witnesses testified to separate important details and facts as to the movements of Mendoza and Noel in bringing the Chinese from Mexico into the United States to the place or house of C. W. Lung in Los Angeles. The witness Mrs. Gillman corroborates the statement of Mendoza and Noel as to their going to Lung's place at the time specified.

It will also be noted [Tr. p. 137] that the defendant C. W. Lung testified that his cash book showed that on November 27, 1911, he drew \$350.00, and that he did not know what he did with the money. This evidently shows that this was the money paid to Mendoza and Noel, or one of them, and the defendant Lung's failure to remember what he did with \$350.00 of his money which his books show he drew on that date is a very incriminating fact in view of the testimony of Mendoza and Noel as to the receipt of \$300.00 from defendant Lung.

We contend that even under the state statute cited by counsel in his brief, the corroboration is amply sufficient to sustain the conviction. That is, if corroboration were required, it is certainly sufficient in this case, for where corroboration is relied on in a case in the Federal court the confirmatory evidence need not extend to the whole testimony; but it being shown that

the accomplice has testified truly in some particulars, the jury may infer that he has in others.

U. S. v. Lancaster *et al.*, 44 Fed. Rep. 896;

U. S. v. Ybanney, 53 Fed. Rep. 540;

Keliher v. U. S., 193 Fed. R. 8;

U. S. v. Giuliani, 147 Fed. Rep. 598.

Hence, we submit that the appeal in this case is without any merit, and that the judgment of the trial court should be affirmed.

Respectfully submitted,

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